IMPORTANT FEATURES

OF

Pleading and Practice

UNDER THE

New York Civil Practice Act

BY

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PREFACE.

This series of ten lectures was originally delivered in New York City in October 1921, immediately after the Civil Practice Act went into effect; the course was repeated in New York in November 1921, and again at White Plains, in April 1922. Portions of it were also delivered in the form of single evening addresses to groups of practicing lawyers at New Rochelle, Tarrytown and other places. They were finally given, substantially in the form as here printed, in New York City in May 1922. Because of the many requests from all parts of the State of New York for the subject matter in printed form the present volume has been published.

It is the purpose of the lectures to set forth briefly the changes in the New York law of pleading and practice accomplished by the Civil Practice Act and the Rules of Civil Practice which took effect on October 1st, 1921, and to discuss in some detail the effect of such new provisions as may be regarded as substantial or fundamental.

No attempt has been made to refer specifically to every change to be found in the new law, as it contains an infinite number of slight modifications of the language formerly used in the Code of Civil Procedure, many of which have been inserted merely for the purpose of clarification, and the enumeration of these slight changes would serve no useful purpose and would prove very tedious and uninteresting reading. It is believed, however, that all of the really important modifications in the law have been discussed.

As is already well understood, a number of changes

in the arrangement of the material formerly included in the Code of Civil Procedure consisted in removing certain of this material to the various Chapters of the Consolidated Laws, and in creating certain new and separate Acts, such as the Surrogate's Court Act, the New York City Court Act, the Justices' Court Act and so on. As these former sections of the Code of Civil Procedure may easily be located by reference to the table now published with the new Civil Practice Act, no enumeration of such changes has been made in any of these lectures.

A perhaps not surprising but at least significant fact is that since October 1st, 1921, there have been over 650 decisions relating to sections of the Civil Practice Act and the Rules of Civil Practice appearing in the New York Law Journal alone. All of these decisions, and also a considerable number from other parts of the state, have been carefully considered in connection with these lectures. It is a great pleasure to note that, with a very few exceptions, the distinct tendency of the courts in all parts of the state has been to interpret the provisions of the new law in a broad and liberal spirit.

No doubt some errors will be found herein. It is hoped they may be few and that they may not be judged too harshly.

Many thanks are due to the practicing attorneys and clerks of courts who, while attending the lectures as originally given, made a large number of helpful inquiries and suggestions, a considerable number of which are included in the material in its present final form.

HAROLD R. MEDINA.

NEW YORK CITY, June 5th, 1922.

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Course of Lectures on the New York Civil Practice Act and the Rules of Civil Practice

LECTURE I.

Historical Outline.

Before entering upon a discussion in detail of the provisions of the new Civil Practice Act and the Rules of Civil Practice which took effect on October 1st, 1921, it is important to understand at least in a general way the history of procedural reform in the State of New York which led up to the adoption of the Civil Practice Act by the Legislature in 1920. There has never been a time in this State when the clamor for reform in matters of practice and procedure has ceased; and indeed, the conditions which have existed in the past have amply justified the public demand for simplification and reform. In the early part of the nineteenth century matters of procedure were regulated by a great many special rules adopted by the various courts and also by a large number of statutory provisions appearing in the various separately published volumes of the Acts of the Legislature. No attempt whatever had been made to coördinate these rules, nor was anyone other than the most skillful and erudite practitioners familiar with them. It was by no means an unusual occurrence for a litigant to find his case disposed of upon some technical ground which left the merits of the case entirely untouched, with the result that an enormous public demand for procedural reform developed culminating in the passage of the Code of Procedure,

commonly known as the Field Code, in 1848. The demand at that time was largely for a definite and precise set of rules covering the various matters of pleading and practice in such fashion that the rules and their application might be made thoroughly plain and understandable. After a further period during which great dissatisfaction with the Field Code was expressed and many radically different plans of reform suggested, the Code of Civil Procedure, commonly known as the Throop Code, was finally adopted in 1877. The reform accomplished by the passage of the Code of Civil Procedure, which was at once copied by a great many of the other States throughout the country, was the great detail with which every step in the course of a civil action was specifically set forth with detailed provisions and definitions to cover special matters, particular actions and special proceedings. We all know that those provisions which seemed so plain and understandable as they were first written proved, in their application to the specific facts of the many cases which arose, a source of continual controversy, and the decisions construing the various sections of the Code of Civil Procedure are legion.

Thus it was that with the natural back-swing of the pendulum, there came a time when with the experience of the reformed procedure in England and the short practice act and rules of the State of New Jersey in mind, the demand for further and radical reform in this State grew into a request for a short practice act and rules. Not that this demand was in any sense unanimous, but that many careful practitioners felt that the very detail which encumbered the Code was of itself a fruitful source of further litigation which might well be avoided by adopting the short practice act and rules

system. Then again criticism was heaped upon the system which made it possible for the Legislature at every session to tinker with the Code of Civil Procedure, thus creating new ambiguities and fostering a wholly unscientific and haphazard development of the law of procedure. It was stated by these critics that the short practice act would place within the power of the Legislature only broad and fundamental matters, reserving to the judges the formulation of rules covering matters of detail.

In 1915 there was submitted to the Legislature by the Board of Statutory Consolidation, of which Hon. Adolph J. Rodenbeck was the Chairman, a proposed short practice act for enactment and a proposed set of suggested rules. The Rodenbeck proposed act was never passed but it served to stimulate a more careful discussion of the whole subject and resulted in the appointment of a Joint Legislative Committee in 1916, of which State Senator J. Henry Walters was the chairman. The present Practice Act as finally enacted in 1920 was prepared by the Walters Committee after an exhaustive canvass of the State to get the consensus of opinion from lawyers in all parts of the State concerning the proposed reform.

There are certain features of the Practice Act as thus prepared and submitted which it is well to bear in mind. In the first place it may clearly be characterized as a compromise between the system embodied in the Code of Civil Procedure and the proposed short practice act and rules system. It is a compromise in this sense, that most of the general provisions concerning the course of the ordinary civil action, including matters of jurisdiction, general practice, provisional remedies, trials, judgments and appeals, still appear

in the statute itself, together with many of the provisions relating to particular actions and proceedings and the provisions relating to costs, disbursements and fees. On the other hand, the subject matter now covered by the Rules of Civil Practice is very much more extensive than that previously included in the old General Rules of Practice. There were eighty-six General Rules of Practice and there are now three hundred Rules of Civil Practice. The Legislature thus retains general control over the great body of the law of procedure in the State, but has lost control over many of the details of practice that it had under the Code.

In the second place, the suggestions of the Board of Statutory Consolidation have largely been carried out in the matter of transferring to the Consolidated Laws a great deal of material formerly included in the Code. There is now a separate Surrogate's Court Act, a separate New York City Court Act, a separate Justices' Court Act, and many former provisions of the Code have been transferred to the Civil Rights Law, the Condemnation Law, the Decedents' Estate Law, the General Corporation Law, the Prison Law, the Real Property Law, the Judiciary Law, and so on. No attempt will here be made to enumerate the provisions that have thus been taken to the various parts of the Consolidated Laws as they may easily be found by consulting the table of distribution which is published in all standard editions of the Civil Practice Act, and in the Parsons' Practice Manual there will be found conveniently reprinted in the back of the volume in alphabetical order the various portions of the Consolidated Laws containing matter removed from the former Code.

It must be borne in mind that the Civil Practice Act

and the Rules of Civil Practice are in no sense a short practice act and rules. In all probability, the amount of printed matter contained in the Code is very little, if at all, greater than the amount of printed matter now contained in the Civil Practice Act, the Rules of Civil Practice and the various separate statutes to which former provisions of the Code have been removed.

This being the case, there has been a great deal of somewhat acrimonious criticism of the Civil Practice Act on the ground that such reforms as have been accomplished might just as easily have been brought about by a systematic and thorough amendment of the Code preserving the old section numbers and the old arrangement. I do not believe this criticism is well founded. The present rearrangement is much more logical, the arrangement of the sections is much more convenient, the subject matter is more compact, and the result has been a more perfect Act as a whole than it would seem could have been possible by a mere set of amendments to the Code. It will, of course, be inconvenient for a time for lawyers to acquaint themselves with the new arrangement and the new numbers. I believe, however, that this inconvenience is not as great as has been supposed. Furthermore, the benefit of a new and distinct act which is thoroughly understood by the Bench and Bar to be the result of a reform movement calling for greater liberality and less technicality in matters of procedure, has made it possible for the judges to take the Act as a new and independent statute and construe it accordingly in a spirit of broad liberality.

I remember very well hearing a number of prominent members of the Bar discussing the Practice Act in October 1921. The consensus of opinion as expressed

by this little group at that time was that the Civil Practice Act was all well enough in its way, but that it would do no good at all unless liberally construed by the judges, and each and every member of the group expressed the opinion that the Practice Act would be construed in the same narrow and technical fashion as was the Code with the result that in a few years we would find ourselves largely in the position from which we started. I did not share these views and I remember being told by these gentlemen at the time that I was too optimistic, but that I should learn with time. Fortunately, the many opinions that have already been rendered with reference to the Practice Act indicate a positive zeal on the part of the courts generally throughout the State to interpret its provisions in an extremely liberal way. A splendid start has been made and I personally believe that as soon as the Bar in general comes to fully realize that the judges as a whole are determined to give a broad and liberal construction to the Practice Act and each and every part thereof, we shall find that the reform accomplished has been far more substantial than even its most optimistic proponents had hoped. I am emphasizing this circumstance at the very beginning of this course, because I think it should be constantly borne in mind and because I have noted a distinct tendency on the part of many lawyers to single out with meticulous care in many of the sections some little word or punctuation mark which may give some color to a contention which would in effect nullify the result apparently intended by the Legislature in that particular section.

I wish to read one or two extracts from decisions recently made which indicate the attitude of the courts toward the Practice Act.

In *Stehli Silks Corp. v. Kleinberg,* 200 App. Div. 16, decided by the Appellate Division, First Department, in February 1922, in the course of an opinion granting the plaintiff leave to serve an amended complaint and directing that the case should retain its place upon the calendar, it was said:

"In order to give the Civil Practice Act the effect which its passage was intended to secure, it must be applied in a broad and liberal spirit, and its provisions must not be restricted by a forced or narrow interpretation, based on the language of former sections in the Code of Civil Procedure, which have been totally superseded by the later legislation."

In *137 East 66th Street, Inc. v. Lawrence,* Bijur, J., sitting at Special Term, Part One of the Supreme Court, New York County (N. Y. L. J. of April 19, 1922), said:

"Under a liberal interpretation of the provisions of the sections of the Civil Practice Act heretofore quoted I am inclined to believe that the form of the complaint is warranted by Section 211 because in a broad sense and according to the English precedents the claims of the plaintiff have arisen out of the same transaction or series of transactions and do raise common questions of fact and law. In this aspect I am considering the causes of action as the pleader intends them to be understood, and not weighing their intrinsic sufficiency."

In *Reilly v. Baldwin Locomotive Works,* Wagner, J., sitting at Special Term, Part One of the Supreme Court, New York County (N. Y. L. J., Dec. 23, 1921), said, speaking of the Practice Act:

"Its progressive rules of procedure should convince even the most incredulous that the administration of justice is more concerned with the eliciting of truth than adherence to technical procedure."

Further illustrations might be multiplied almost indefinitely, but probably the most severe test to which the courts have been put in the matter of liberal construction relates to Section 1569 of the Civil Practice

Act, which purports to classify those cases to which the provisions of the Civil Practice Act are applicable and those cases to which the provisions of the Code of Civil Procedure are applicable. In general, the scheme of this and the immediately preceding section is that as to all actions commenced on or after October 1st, 1921, the provisions of the Civil Practice Act shall be applicable, and that as to all actions begun prior to October 1st, 1921, the provisions of the Code of Civil Procedure shall be applicable. Section 1569 then continues to provide,

"except that the court or judge may apply thereto (i. e., actions begun prior to October 1st, 1921), in the interest of justice, any remedial provision of this Act not inconsistent with the proceedings theretofore had or taken in such action or special proceeding."

A particular situation arose almost immediately after the first of October 1921, which, as I have said, put the courts to the acid test in the matter of liberal construction. The portion of the Civil Practice Act relating to depositions, which will be discussed in considerable detail a little later on in this course, sets forth an entirely new system for examinations before trial. Briefly, the system is merely to serve a notice on the attorney for the other side stating that the examination is desired to be taken at a certain time and place and it is then incumbent upon the other side, if he so desires, to make a motion to vacate the notice, thus shifting the burden upon the person making the motion to vacate. In an action begun prior to October 1, 1921, one of the parties served such a notice, without having previously obtained any permission from any court or judge to do so. A motion was promptly made to strike out the notice as unauthorized upon the following grounds:

(1) That as the action was begun prior to October 1, 1921, the method of taking the examination before trial pursuant to notice could only be available, if at all, after express permission from the court or judge first obtained, and
(2) That the provisions concerning examinations before trial were not remedial and therefore not available in actions begun prior to the time the Practice Act took effect.

It must be admitted that the words "except that the court or judge may apply thereto" were easily susceptible of the interpretation placed upon them by the party moving to vacate the notice. It was very properly held, however, Mr. Justice Squiers blazing the way, in a decision at Special Term, Part One of the Supreme Court, Kings County, which appeared in the New York Law Journal on October 21, 1921, that Section 1569 did not state when the court or judge might apply the provision nor what court or judge should apply it, and that he would then and there, upon the hearing of the motion to vacate the notice, apply the provision of the Practice Act to the pending cause, and he denied the motion.

This case, *Buehler v. Bush,* was affirmed by the Appellate Division of the Second Department, 200 App. Div. 206, saying:

"The intent and purpose of the Civil Practice Act is to remove from proceedings of this character all procedural trammels and to permit examinations of adverse parties with as few restrictions as possible."

A similar decision was reached by the Appellate Division of the Fourth Department in *MacDonald v. Hamilton B. Wills & Co.,* 199 App. Div. 203. In the course of this decision the court discussed, at some length, the meaning of the words "any remedial provision of this Act" as contained in Section 1569, and the following broad and liberal interpretation was announced:

"I think that the words 'any remedial provision of this Act' include any provision contained in the Act which was enacted for the purpose of simplifying the procedure to be followed in enforcing rights and redressing wrongs and which is intended to overcome defects in the procedure as it existed under the Code of Civil Procedure."

Of course, the effect of the decision in the *MacDonald* case was to hold that the courts might apply to actions begun prior to October 1st, 1921, any provision of the Practice Act whatsoever in the interests of substantial justice.

While apparently going very far, it is difficult to see how the word remedial could be given any more restricted interpretation. It might have been simpler, however, for the court to merely say that the word remedial was used in the sense of a provision of adjective law as distinct from a provision of substantive law. Adopting this simple test, the result would have been that any provision of the Civil Practice Act relating to adjective law might in the discretion of the court or judge be applied in an action pending prior to October 1, 1921, when not inconsistent with any proceedings theretofore had in that action. While it was objected by some that this interpretation covered practically every new provision in the Civil Practice Act, there appears to be no good reason why it should be rejected on that score alone.

On the matter of the examination of parties before trial pursuant to notice in actions begun prior to October 1, 1921, it is interesting to note that the Special Term decisions in New York County are in accord with the decisions of the Appellate Divisions in the Second and Fourth Departments above mentioned (*Coghlan v. Jenkins,* Sup. Court, N. Y. County, Spec. Term, Part I, Cohalan, J., New York Law Journal, May 6, 1922;

Strasch v. Rosenblatt et al., Sup. Court, N. Y. County, Spec. Term, Part I, Giegerich, J., New York Law Journal, Jan. 12, 1922).

Organization of Courts.

It is a significant fact that the Civil Practice Act preserves intact the organization of the various courts throughout the State and does not vary their jurisdiction, nor in any sense change the normal course of the ordinary civil action or special proceeding. It is true that there is now a separate Surrogate's Court Act, a separate New York City Court Act, and a separate Justices' Court Act, but these separate acts are practically mere reprints of the portions of the Code of Civil Procedure formerly relating to these special courts. This is particularly true with respect to the Surrogates' Courts and the City Court of New York City.

Actions are still begun as before by the service of a summons; the pleadings as heretofore consist of a complaint, answer and in the event that the answer contains a counterclaim or a special motion is made to compel a reply to an affirmative defense in an answer, then also a reply. Demurrers have been abolished, however, and motions substituted in lieu thereof. These motions will, of course, be discussed in considerable detail later in this course.

While on the matter of jurisdiction, there is one peculiar feature of the Practice Act which has been the subject of some discussion and which it may be well to mention. Under the Code, where the plaintiff's recovery was less than $50.00, the rule was that in contract actions, the defendant, in such event, would get a full bill of costs, and in tort actions the plaintiff's

costs could not exceed his damages. It is very evident that the committee which prepared and submitted the Practice Act did not intend any change in the law in this particular. By a curious slip in the preparation of Section 1475 of the Practice Act, however, an opportunity was offered to contend that in an action on contract in the Supreme Court, where the plaintiff's recovery was less than $50.00, neither party should get costs. Turning to Section 1475 we see that it reads, "the defendant is entitled to costs, of course, upon the rendering of final judgment in an action specified in the *last preceding section,* unless the plaintiff is entitled to costs as therein prescribed * * *." This language was taken directly from former Section 3229 of the Code and the words "last preceding Section" of course referred to Code Section 3228. Section 1474, however, which as to Section 1475 is now the "last preceding section," does not in any sense enumerate the classes of actions heretofore enumerated in Code Section 3228, but rather relates to the limitation of the plaintiff's costs in certain actions in New York, Kings, Rensselaer, Bronx, Queens, and Erie Counties. The result was that a literal reading of Section 1472, relating to actions where the plaintiff recovers less than $50.00, merely deprived the plaintiff of costs, and there is no section affirmatively awarding said costs to the defendant.

Fortunately Section 1475 was amended by the Legislature by Chapter 92 of the Laws of 1922, so as to eliminate the words "the last preceding section" and substitute in lieu thereof the words "Sections 1470 to 1473." This amendment took effect on March 7th, 1922, and it has already been judicially determined, although only by *dictum,* that in an action on contract,

where the plaintiff's recovery was less than $50.00, the defendant is entitled to full costs as a matter of course (*Fisher v. Chas. H. Van Aken Co., Inc.*, Special Term, Part 1, New York City Court, Callahan, J., N. Y. L. J., May 3, 1922).

Summons and Service Thereof.

For some reason which is not entirely clear the Convention to consider and adopt rules of civil practice included in Rule 10 a provision that no papers should be received by the Clerk for filing nor should the court or judge hear any application thereon, except where the papers are "of the usual legal cap size." This provision, of course, excludes such forms as summonses, notices of trial, notices of appearance, and so on, as they were customarily printed by law stationers prior to October 1, 1921, and I am informed that a great deal of trouble and embarrassment has been caused in New York County and in several other counties by the insistence by the Clerk that lawyers comply with Rule 10 in this respect. In other parts of the State apparently the rule is being disregarded.

In order to comply with this rule, it is necessary either to have the summons typewritten out in full on a sheet of the usual legal cap size or to paste one of the printed summonses, as I am informed a number of lawyers have already done, upon ordinary legal cap paper properly endorsed. This rule should, it seems to me, be amended.

Another feature of Rule 10 with reference to legal cap paper which may as well be mentioned here is that it was the custom of lawyers to file proposed cases on appeal tentatively printed on paper of the size required to be filed in the Appellate Division, so as to

save the trouble of separately preparing a proposed case and then later printing the case as finally settled. Such a printed proposed case would not comply with Rule 10.

In this connection, also, it is well to bear in mind Rule 235, which provides for the size of the paper to be used in connection with printed records on appeal and briefs and all other papers furnished in the Appellate Division. Apparently the Convention did not have in mind the circumstance that the occasion might arise, whether by way of remittitur or otherwise, to file with the various county clerks papers used in some other connection in the Appellate Division. In this respect apparently Rule 10 and Rule 235 are in partial conflict.

There is, as most of us are already aware, a new form of summons as provided in Rule 45, and this new form has given rise to a considerable number of conflicting decisions which must be discussed in some detail. The only change is the addition of the words "or, if the complaint is not served with this summons, to serve a notice of appearance." This change was not made because absolutely necessary, nor because there was any intent to change substantially the effect of the summons. The change is merely by way of clarification so that a layman upon receiving a summons, when served *without a complaint thereto attached,* might thoroughly understand that he was in that instance, and in that instance alone, required to appear, in order to prevent a default. In other words, the defendant still has twenty days to appear or answer, but he is plainly informed in the new form of summons that he is required to answer if the complaint is served with the summons, and if the complaint is

not served with the summons, he is required to appear.

As was inevitable, a large number of summonses in the old form have been served since October 1, 1921, either due to the failure of the attorneys for the plaintiffs in these actions to realize that the change in the form of the summons has been made, or as is more likely, due to the existence in the various law offices of a batch of the old printed forms of summonses which were carelessly used.

The question thus arises as to what action the courts should take where the defendant moves to set aside the service of a summons, basing such motion upon the fact that the old form was used. There are two possible cases: (1) where the summons is served alone and unaccompanied by a complaint, and (2) where the summons is served with the complaint. My own opinion in the matter is that if the summons is served together with a complaint, the defect is one which by the express mandate of Section 105 of the Civil Practice Act the courts *must* disregard, as it is perfectly obvious that no substantial right of the defendant is in any way prejudiced.

Where the summons is served alone, it seems to me that under a long line of decisions of the Court of Appeals, of which *Gribbon v. Freel*, 93 N. Y. 93, may be regarded as the leading case, this defect is a mere irregularity and not a jurisdictional defect, and therefore the defendant is even in this case not entitled to a dismissal of the action and an order setting aside the service of the summons. The situation seems so clear both in view of the authorities and as a matter of plain common sense that it is difficult to see how any court could under any circumstances feel justified in dismissing the action because the old form summons

was used. If the defendant claims that he was misled by the use of the old form, and it appears that judgment has been entered against him because of his failure to appear, then I suppose he would be plainly entitled to have the judgment set aside and an opportunity given to him to appear and demand a copy of the complaint and in due course defend the action. Where by appearing in court and moving to set aside the service of the summons the defendant demonstrates very plainly that he has not been misled by the use of the old form of summons, I should think the courts should deny the motion with costs.

Now let us briefly examine the authorities on the subject which are very strangely in conflict. The first decision made after October 1, 1921, on this point is *Kenngott v. Kenngott,* 190 N. Y. Supp. 282. That was a case decided by Mr. Justice Taylor, at Special Term, in Cattaraugus County. The summons and complaint were served together, but in spite of this fact Mr. Justice Taylor granted the motion to set aside service of the summons and dismissed the action, holding that the defect was a jurisdictional one. This decision seems clearly unsound.

The next decision was *Siccardi v. Ajello,* 117 Misc. 118, decided by Mr. Justice Benedict at Special Term, Part I of the Supreme Court, Kings County, on November 19, 1921. The facts were the same as in the *Kenngott* case, and Mr. Justice Benedict properly held that the defect in no sense misled or prejudiced the defendant, and he denied the motion to set aside the service of the summons "without costs." He added by way of dictum, however, "if the complaint had not accompanied the summons, I should have to hold differently" (See also *American Discount Corp'n v. Moore,* City

Court of N. Y. City, Spec. Term, Part I, Meyer, J., N. Y. L. J., Nov. 4, 1921).

Finally, in *Schack v. Bryan,* 118 Misc. 90, Mr. Justice Guy, at Special Term, Part I of the Supreme Court, New York County, decided a case where the old form summons had been served alone. The defendant made a motion to set aside service of the summons, claiming that the defect was a jurisdictional one. The attorney for the plaintiff, however, was foresighted enough to make application under Section 105 of the Civil Practice Act for permission to amend his summons, and the two motions came on for argument together. Mr. Justice Guy held that the plaintiff's motion to amend the summons should be granted and the defendant's motion to set aside service of the summons denied "with $10.00 costs to the attorneys for the defendant."

This decision of Mr. Justice Guy seems in exact accordance with the provisions of the Civil Practice Act and may be paraphrased as follows: The use of the old form summons, even if served alone and unaccompanied by the complaint, is a mere irregularity, not a jurisdictional defect; the use of such old form, however, may be prejudicial to the defendant and therefore in such a case the defect may not be disregarded; it is, however, clearly a defect which may be corrected or supplied as provided in Section 105 "in the discretion of the court, with or without terms."

One other decision should perhaps be referred to. In *Salzman v. Knobel,* Mr. Justice Finelite, at Special Term, Part I, of the City Court of New York City (N. Y. L. J., March 11, 1922), granted a motion to set aside service of a summons where the old form had been used unaccompanied by a complaint. He held the summons

to be a nullity following the dictum of Mr. Justice Benedict in *Siccardi v. Ajello, supra.* This *dictum* of Mr. Justice Benedict and the decision of Mr. Justice Finelite appear to be erroneous on principle, and the true rule to be stated by Mr. Justice Guy in *Schack v. Bryan.*

Before leaving this subject, I should like to add a word about the decision by Mr. Justice Guy in *Schack v. Bryan, supra.* In the course of his brief opinion he says:

> "Where a summons in the old form is served, without a complaint, since the Civil Practice Act took effect, and there is neither a waiver nor a motion to amend the summons, it should be set aside on motion."

While technically accurate in every respect the intimation contained in this statement is that it is up to the plaintiff to make a motion under Section 105 to amend his defective summons, and that if no such motion is made, the action should be dismissed. This seems to me to be a very curious way of going about the matter. In so plain a situation as this, I believe it should be incumbent upon the justice sitting at Special Term, Part I, to himself suggest to the plaintiff's attorney upon the hearing of the motion to set aside the service of the summons, that the court would entertain a motion to amend the summons and thus dispose of the matter in an expeditious and just manner. No doubt, had the plaintiff's attorney, either through ignorance or neglect failed to make such an application in *Schack v. Bryan,* Mr. Justice Guy would have made such a suggestion to him upon the argument of the motion to set aside the service of the summons. Many of the judges, however, feel that the duty of making such motions rests exclusively with

the attorneys, who may or may not be competent; and it is believed that the interests of justice will be served to a much greater degree if the judges will regard themselves less as umpires or referees deciding isolated questions submitted by the litigants and more as judges vested with full powers to dispose of the controversy and do justice between the parties. This, I am informed has been the practice for years in England, and, particularly since the adoption of the Civil Practice Act and the Rules of Civil Practice in New York, there has been a notable disposition on the part of the courts here, as far as possible, to dispose of the controversy whatever it may be and not merely decide technical matter submitted on a particular motion (See *Chersonsky v. Scheflin,* Supreme Court, Kings County, Spec. Term, Part I, MacCrate, J., N. Y. L. J., Jan. 19, 1922).

It is difficult to overestimate the real service which could be rendered by the judges if they could all be induced in connection with practice motions coming on for hearing at the Special Term for the disposition of contested motions to insist, wherever possible, upon disposing of the controversy presented by the motion. In spite of the very plain efforts in this direction which are being made on many of the judges, it is quite surprising to see the number of motions which are denied from day to day without prejudice to their renewal at a later date upon a new set of motion papers which shall supply some defect in the motion as already made, and instances where motions are denied because the proper relief has not been prayed for. While perhaps technically accurate, such decisions only serve to congest the Special Term calendars and to impose additional burdens upon the lawyers and litigants. Fortunately the Civil Practice Act gives to the judges sitting at Special

Term ample powers to require the filing of additional papers or the making of an additional motion when necessary, so that the application which originally comes up for hearing may be finally disposed of. There are one or two recent illustrations which are worthy of mention.

In *Lowther v. New York Life Insurance Co.*, a motion for summary judgment under Rule 113 was argued before Mr. Justice Platzek at Special Term, Part VI, of the Supreme Court, New York County (N. Y. L. J., March 21, 1922). The motion papers did not ask for any relief under Rule 112, but solely for an order granting to the plaintiff summary judgment under Rule 113. Upon glancing at the pleadings Mr. Justice Platzek was convinced that the plaintiff was entitled to judgment on the pleadings under Rule 112 and accordingly, "under the prayer for other relief" contained in the notice of motion, an order was entered granting to the plaintiff judgment on the pleadings with leave to the defendant to serve an amended answer within ten days after service of the order.

In *Midower v. MacDermott*, a motion to preclude the plaintiff from giving any evidence with reference to the particulars directed to be furnished in the bill of particulars as required by a prior order come on for argument before Mr. Justice Giegerich at Special Term, Part I, of the Supreme Court, New York County (N. Y. L. J., January 10, 1922). As the technical practice in such cases required the plaintiff to make a motion to be relieved of his default in failing to serve the bill of particulars as directed, and as no such motion had been made, Mr. Justice Giegerich pointed out that on the papers which were then before him he would be required to grant the motion to preclude, but he sug-

gested at the end of his brief opinion that the plaintiff make a motion for an order relieving her of her default in failing to obey the order directing the service of a bill of particulars, and in order to enable the plaintiff to make such a motion he directed the motion for an order of preclusion to be adjourned until the following Friday, at which time both matters could come on for hearing and the entire question be finally disposed of.

Turning now to another subject, we find that the provision formerly contained in Section 1245a of the Code requiring all summonses and pleadings in actions pending in New York and Bronx Counties to be filed, has been repealed and the practice is now made uniform throughout the State. The matter is covered by Section 100 of the Civil Practice Act which provides:

"Filing papers in an action. The summons and each pleading in an action must be filed with the clerk by the party in whose behalf it is served within five days after notice from the adverse party requiring such filing, and upon failure to comply with such notice, the court or a judge, in its or his discretion, may order that such summons or pleading be deemed abandoned either absolutely or upon failure to file within a time, if any, permitted by the order."

I may say that I find very little comfort in Section 100, which reminds me of an experience I had a number of years ago in connection with Section 824 of the Code which contained substantially the same provisions as are now in Section 100 of the Civil Practice Act. I had begun an action against a defendant who was the maker of a promissory note and I held in my possession letters from him admitting the indebtedness and a copy of an affidavit, the original of which he had filed in a certain bankruptcy proceeding where this obligation was set forth as a valid and existing one. To my surprise a verified answer containing a general

denial was served in due course and I noticed that the original answer was not filed in the New York County Clerk's Office as required by Section 1245a of the Code. As no motion for summary judgment was available under the Code and as I thought I should probably desire to prosecute the defendant for perjury, I served a notice, pursuant to Section 824 of the Code, requiring the defendant to file the answer. The attorney for the defendant paid no attention to this notice and in due course and following the procedure outlined in Section 824 of the Code, which is now repeated verbatim in Section 100 of the Civil Practice Act, I made a motion for an order directing that the "pleading be deemed abandoned." On the return day, counsel for the defendant appeared. He said he was very sorry that he had not filed the answer, but that he had it in court and was ready to file it forthwith. I argued at some length that the case was one where the defendant really should not be entitled to defend in any event and that he had flatly refused to obey the notice served pursuant to law and I claimed the penalty prescribed. The court, however, felt that the penalty was a harsh one and so my motion was denied without costs, and the answer was finally filed.

This illustrates the benefit which may be derived from Section 100 of the Civil Practice Act. It is no doubt a desirable thing to have the practice uniform throughout the State; but it has always seemed to me that the rule contained in former Section 1245a of the Code requiring all summonses and pleadings to be filed promptly after their service was a very salutary and necessary one. The requirement that a delinquent party apply to the court for an order permitting the filing nunc pro tunc was a sufficient penalty to cause

everyone to file their summonses and pleadings as a matter of course, which meant that litigants and parties interested could always find upon the files of the County Clerk's Office the summons and the pleadings in all pending actions.

With reference to the notices required to be placed upon summonses in matrimonial actions no change has been made and this is equally true about the notices permitted to be attached to summonses in actions for the recovery of liquidated claims where it is desired to enter judgment by default before the Clerk without the necessity of preparing a complaint. These provisions are now contained in Rules 46 and 47.

The provision requiring a notice on the summons where the action is brought to recover a penalty has been repealed as to the Supreme Court and is not now contained in the Civil Practice Act at all. It is included, however, as Section 49 of the Justices' Court Act, no doubt because such actions were normally brought in the Justices' Courts and it was not thought desirable to have any provision with reference thereto in the Civil Practice Act.

There are a number of other changes with reference to the summons and the service thereof which are not in themselves very vital, but which it is certainly important to note. As considerable difficulty had been experienced in the matter of obtaining jurisdiction over the people of the State of New York, it was believed that the provisions relating to the service of a summons upon the defendant in such a case should be liberalized. Accordingly the following new sentence was added to Section 221:

"The delivery of a copy of the summons to a deputy attorney-general in person at the office of the attorney-general shall be equivalent to personal service on the attorney-general."

It will be observed that the service upon a deputy attorney-general may only be made "at the office of the attorney-general" and it will probably now no longer be necessary to follow the method so commonly adopted under the Code of mailing a copy of the summons and complaint to the office of the attorney-general at Albany requesting a notice of appearance.

The law with reference to the personal service of a summons upon an infant under the age of fourteen years has been changed, and the requirement that a copy of the summons be also delivered in behalf of the infant to a person designated in an order, is now made discretionary. It seems entirely unnecessary to require such an order to be made and it will be recalled that the provision making the service upon a person so designated absolutely essential was added to Section 426 of the Code in 1913 and caused a great deal of adverse comment.

Another very desirable change has been made in reference to the personal service of a summons upon a person judicially declared to be incompetent. The Code required the service to be made personally upon both the Committee and the incompetent defendant and service upon the incompetent defendant might only be dispensed with upon proof being made that such service would tend to aggravate the malady of the defendant or to lessen the probability of his recovery. It was quite manifest that in many cases it was very difficult to make such proof, with the result that plaintiffs were frequently compelled to go to considerable expense to make personal service upon insane persons whose disorder was such that the service of a summons upon them was the merest formality and served no useful purpose. Accordingly, Section 225 of the Civil Prac-

tice Act now provides that the court may make an order dispensing with the delivery of a summons to the incompetent person in *any* case in the discretion of the court. I suppose that proof that the incompetent person had been violently insane for many years would suffice to warrant the court in its discretion in making an order dispensing with the service upon the incompetent person himself, particularly where the incompetent was incarcerated in some asylum located in a county distant from the county where the action was brought and where the plaintiff's attorney resided.

There is a further change with reference to personal service of a summons upon a foreign corporation which greatly tends to clarify the provisions of the Practice Act on this point, and that is the elimination, in case of serving a cashier, director or managing agent of a foreign corporation, of proof that the corporation had property in the state or that the cause of action arose therein. It is now provided in Section 229, subdivision 3, that service may be made upon a cashier, director or managing agent of a foreign corporation upon merely showing that service may not be made upon one of the general officers of the corporation, or the person designated pursuant to Section 16 of the General Corporation Law, within the state with due diligence.

The importance of this change is not entirely apparent upon the surface, but it really amounts to a substantial clarification of the law. In connection with my work with law students for the past ten years, I have found that the old provision produced considerable confusion. Students persistently asked what the purpose was of requiring proof that the cause of action arose in the state or that the corporation had

property in the state. This was a difficult question to answer because it was very plain that the section of the Code containing this requirement related in no sense to the jurisdiction of the court over the subject of the action, but only to the question of personal jurisdiction and the Supreme Court of the United States in *Pennoyer v. Neff*, 95 U. S. 714, has very plainly stated the law to be that in the matter of jurisdiction the mere existence generally of property of the defendant located somewhere within the state, where such property had not been already levied upon pursuant to attachment, was entirely immaterial. It was accordingly obvious that the requirement of the Code that proof be made that there was property of the defendant within the state or that the cause of action arose therein, served no useful purpose whatever and merely tended to hamper the courts in obtaining jurisdiction over foreign corporations, contrary to the established policy of all state legislatures. Indeed, the only explanation of the origin of this curious requirement of the Code was that it was placed in the original Code of Procedure at a time when the law with reference to jurisdiction over foreign corporations was in a very unsettled and undeveloped state, and as the law then stood it was supposed that it might make some difference in the matter of jurisdiction whether the corporation had property in the state or the cause of action arose therein.

Turning now to the subject of substituted service, we find that the Legislature has made a very substantial change in the enumeration of those instances in which the plaintiff is entitled to an order for substituted service. In one sense the rules as to substituted service remain the same, namely, that such an order

may only be obtained where the defendant is a resident of the state or a domestic corporation and also in the respect that the judgment obtained after substituted service remains as completely effective for all purposes as a judgment obtained after personal service of the summons. The Code, however, only permitted the making of an order for substituted service of the summons where proof was made that the place of sojourn of the defendant could not be ascertained, or, if within the state, that the defendant avoided service. These provisions were manifestly inadequate as there were many instances in which a resident defendant, although absent from the state for a more or less protracted period, could prevent substituted service of the summons by merely leaving with some agent a statement of the place of his sojourn. Furthermore, it has been the common experience of attorneys in the past that proof that a defendant is avoiding service is not always easy to make, even though repeated efforts have been made to serve the summons personally and a strong suspicion may exist that the defendant is deliberately avoiding service.

The entire situation is adequately covered by Section 230 of the Civil Practice Act which provides that an order for substituted service of the summons may be issued "upon satisfactory proof that the plaintiff has been or will be unable, with due diligence, to make personal service of the summons within the state."

This is a much more sensible provision than that contained in the Code, is entirely fair to resident defendants who may not be readily available for personal service and is on the whole a very salutary provision.

There are one or two observations, however, that should be made in this connection. In the first place,

proof that the process server merely went to the defendant's residence and place of business and asked for him and was told that he was not in at the time, even though this inquiry be repeated on various occasions, will not of itself suffice. It is as essential today, as it was under the Code, to show that the process server informed the persons with whom he spoke at the defendant's residence and at his place of business of the fact that he wished to see the defendant *for the purpose of serving a summons upon him.* In the second place, there is a situation likely to arise very frequently which is illustrated by the facts of a recent case. The defendant, a resident of New York, went to Cuba for a brief, but indefinite sojourn, by way of vacation. During his absence an order for the substituted service of a summons on the defendant was obtained merely upon the ground that, as the defendant was in Cuba, it was quite apparent that personal service of the summons upon him could not be made with due diligence within the state. The motion to set aside the order for substituted service was denied by Wendel, J., at Special Term, Part I, of the City Court of New York City in *Kelly-Hughes Co., Inc. v. Jaffe* (N. Y. L. J., Dec. 14, 1921), on the ground that strict compliance had been made with the requirements of Section 230. While this seems like an extreme case, the decision is clearly sound and it is probable that a similar result would be reached even if the defendant's sojourn in Cuba or any other foreign country was for a short and definite period instead of an indefinite period as in the *Kelly-Hughes Co., Inc.* case. On the other hand, Section 230 is to be given a reasonable interpretation and if it appears that the defendant is merely out of the state for a single day attending a football game at Princeton or

New Haven, or spending a week end at some summer resort, an order for substituted service during such absence would not appear to be authorized by Section 230.

There is also a change in the manner of making substituted service of the summons. Section 231 of the Civil Practice Act now provides that in the event that admittance cannot be obtained at the place designated in the order, a copy of the order and of the summons must be mailed to the defendant by depositing the same "in a post office." The old requirement was that the mailing be made by depositing the same "in a post office at the place where he resides, or where said office, place of business or residence is located."

As to service by publication a number of slight changes have been made, some of which are entirely new and some of which merely serve the purpose of clarification. One or two ambiguities, however, still remain.

Subdivision 4 of Section 232 is entirely new and provides for service by publication upon an infant or incompetent defendant, whether a resident or non-resident of the state, where complete personal service of the summons cannot be made within the state after due diligence. This subdivision eliminates what may properly be characterized as a defect in the law as it existed under the Code. The last paragraph of Section 232 merely serves to supplement said Subdivision 4.

Rule 51 clarifies an ambiguity which existed under the Code, but which had already been disposed of by several court decisions. It will be recalled that there was considerable doubt under the Code as to whether six publications of the summons would suffice or whether seven publications were required. This am-

biguity was due to the fact that Section 440 provided that the publication should be "not less than once a week for six successive weeks," whereas, Section 441 provided that "service by publication is complete upon the date of the last publication." It was perfectly plain that if the six publications were made on six successive Mondays, for example, the last publication would be only thirty-five days from the time of the first publication. As this was less than six weeks, or forty-two days, it was claimed that the seventh publication was required. Although the Court of Appeals decided to the contrary in *Market National Bank v. Pacific National Bank,* 89 N. Y. 397, which held that only six publications were required, and although this decision by the Court of Appeals was followed by a number of Appellate Division cases (*Brooks v. Brooks,* 190 App. Div. 564), I understand that some of the title companies insisted that seven publications were necessary and the matter was in an unsatisfactory state as the Code sections on the matter existed. This ambiguity is now entirely cleared up by Rule 51 which provides:

"For the purpose of reckoning the time within which the defendant must appear or answer, service by publication is complete on the forty-second day after the date of first publication."

This clearly requires only six publications.

There is, however, quite a serious ambiguity which has inadvertently been inserted into the law by the last sentence of this Rule 51. This sentence reads:

"Service without the state in lieu of publication is complete ten days after proof thereof is filed."

This provision is plain enough where there has been an order for service by publication and where the summons is served on the defendant personally outside of

the state "in lieu of publication." In certain cases, however, such as foreclosure actions, it is specifically provided by Section 235 of the Civil Practice Act, which is substantially a repetition of Subdivision 3 of Section 443 of the Code, that personal service of the summons in such cases may be made without the state with the same force and effect as though the summons had been served by publication, although this may be done *without obtaining any order for publication.* On the question of when such service was complete, Section 443 of the Code was very plain because Subdivision 4 thereof provided "service without the state is complete in ten days after proof thereof is filed;" and it required no argument to demonstrate that this provision was equally applicable to service without the state without an order as to service without the state in lieu of publication, pursuant to an order.

The result is that by including the words "in lieu of publication" in Rule 51, there is now no provision whatever in the Civil Practice Act or in the Rules of Civil Practice providing for the time when service is complete where personal service of the summons is made outside of the state without an order.

This very matter has been already judicially determined, however, in the recent case of *Sheafer v. Vermont Hygeia Ice Co.,* where the opinion was rendered by Mr. Justice McAvoy at Special Term, Part VI, of the Supreme Court, New York County (N. Y. L. J., May 2, 1922). Mr. Justice McAvoy held:

"The omission of a direction from both the Act and the Rules with respect to proof of service without the state without an order that it shall be deemed complete ten days after proof of service is filed, makes it evident that proof of service of a summons without the state without an order is deemed complete upon actual service of the summons outside the state."

There is one last matter that should be referred to before we leave the matter of service of the summons. There were, of course, and, even since the Code of Procedure, have been three normal methods of service of the summons: personal service, substituted service and service by publication. By a curious inadvertence there were two almost identical instances in the Code of Civil Procedure which related to entirely distinct subject matters where for some hidden reason, or perhaps for no reason at all, only two of these methods were enumerated. In Section 399 of the Code with reference to the Statute of Limitations, it was provided in substance that when the summons was delivered to the sheriff of the county where the defendant resided the effect thereof was to give the plaintiff an additional sixty days after the expiration of the time limited for the actual commencement of the action to serve personally the same upon the defendant or to make the first publication of the summons against the defendant pursuant to an order for service by publication. There is no reference in Code Section 399 to the method of substituted service.

Curiously enough we find an almost identical situation under Section 1774 of the Code which contains certain regulations respecting the entry of judgment in certain matrimonial actions. It was there provided that a final judgment should not be rendered in favor of the plaintiff upon the defendant's default unless the summons had been personally served upon the defendant or service made by publication as required by law. Here again we find the significant omission of any reference to the method of substituted service.

It has always been my personal belief that the omission in both instances was entirely inadvertent as I

can conceive of no valid reason of logic or policy why the Legislature should intentionally omit a method of service which for all purposes would be deemed at least the equal to, if not the superior to, service by publication.

The decisions under these sections of the Code of Civil Procedure were also in apparent conflict. The Court of Appeals held with respect to Code Section 399 that the omission to specify the method of substituted service was inadvertent and that that method was just as available within the sixty day period as was personal service or service by publication (*Clare v. Lockard,* 122 N. Y. 263). On the other hand, the Appellate Division of the Fourth Department in *Purvis v. Purvis,* 167 App. Div. 717, held, with reference to a matrimonial action, that a judgment by default could not be entered against the defendant where the summons had been served by substituted service.

Here it would seem there was a very excellent opportunity for the Joint Committee in preparing the Civil Practice Act, and for the Legislature, to clarify the situation and make the rule at least uniform and clear. We find that with respect to service within the sixty day period after the delivery of the summons to the sheriff of the county where the defendant resided, in order to stop the running of the Statute of Limitations, Section 17 of the Civil Practice Act now enumerates all three methods of service, thus bringing the letter of the law in accord with the decision of the Court of Appeals in *Clare v. Lockard,* 122 N. Y. 263.

Section 1167 of the Civil Practice Act, however, merely repeats the same language as had previously been used in Section 1774 of the Code.

As a result the situation seems to be anything but

clear; and if the decision of *Purvis v. Purvis,* 167 App. Div. 717, is to be deemed to state accurately the law with respect to the entry of judgment by default in matrimonial actions, the law should be changed by the Legislature at an early date so as to make available in matrimonial actions, as well as others, all three methods of service of the summons.

LECTURE II.

Mistakes, Defects and Irregularities.

Before proceeding to consider the remaining changes accomplished by the Civil Practice Act and the Rules of Civil Practice in regard to the normal procedure during the course of an ordinary civil action, it is necessary that we at this time examine in some detail the new provisions of the Civil Practice Act with reference to mistakes, defects and irregularities because these provisions are applicable to all actions alike and may come into play at any stage of any action, special proceeding or appeal.

The sections to which reference is made are contained in Article 9 of the Civil Practice Act and are Sections 105 to 112 inclusive. It is worthy of note at the outset that Section 1569 of the Civil Practice Act expressly makes all the provisions of Article 9 applicable to actions and proceedings pending prior to October 1, 1921.

Some of the provisions contained in Article 9, namely, Sections 107, 108, 109 and 112 are taken substantially from the Code and they relate to omissions in taking appeals, relief against default judgments and orders, mistakes affecting judgments and the supplying of defects by an appellate court.

The remaining sections should be separately considered as they are entirely new. Section 105 is the most important of them all and this section provides:

"At any stage of any action, special proceeding or appeal, a mistake, omission, irregularity or defect may be corrected or supplied, as the case may be, in the discretion of the court, with or without terms, or, if a substantial right of any party shall not

be thereby prejudiced, such mistake, omission, irregularity or defect must be disregarded."

The note of the Committee with regard to this section is worthy of serious consideration as it appears by this note that Section 105 is not only intended to be considered as a new and important section, but also as containing the substance of Code Section 723, and the 8th, 9th and 10th sentences of Section 768.

With reference to those provisions formerly contained in Code Section 723, the situation is fairly plain and accordingly motions to amend any process, pleading or other proceeding are to be made pursuant to Section 105.

There was one provision of Section 723 of the Code, however, the entire omission of which in Section 105 of the Civil Practice Act gave rise to considerable doubt. I refer to the following sentence of Section 723 of the Code:

"When amending a pleading or permitting the service of an amended or supplemental pleading in a case which is on the general calendar of issues of fact, the court may direct that the case retain the place upon such calendar which it occupied before the amendment or new pleading was allowed, and that the proceedings had upon the amended or supplemental pleadings shall not affect the place of the case upon such calendar, or render necessary the service of a new notice of trial."

The opinion has been expressed by a number of eminent lawyers that because of the omission to repeat this language at some place in the Civil Practice Act, the courts would now find themselves without power to permit the case to retain its place on the calendar on the granting of a motion for permission to serve an amended or supplemental pleading.

Fortunately this situation has already come before the Appellate Division of the First Department in

Stehli Silks Corporation v. Kleinberg, 200 App. Div. 16, where the opinion written by Mr. Justice Dowling vigorously states the rule of liberal construction applicable to the Civil Practice Act and holds that no specific restatement of the rule contained in Section 723 of the Code of Civil Procedure was necessary.

It is hard to exaggerate the importance of this decision as it means that in interpreting the broad language of Section 105 of the Civil Practice Act, the courts will not feel in any sense hampered by language appearing in any part of the old Code of Civil Procedure. It means that Section 105 will be interpreted as though a part of an absolutely new statute of procedure having no necessary connection with its historical background. This is in the interest of substantial justice and should go a great ways toward quieting the fears and doubts so frequently expressed, to the effect that the Civil Practice Act would merely serve to usher in a new era of technical construction in which lawyers would be compelled not merely to familiarize themselves with the provisions of the new Practice Act, but to be also thoroughly acquainted with the Code of Civil Procedure, the Code of Procedure, the English Rules of Practice, the New Jersey Practice Act and other sources from which portions of the Civil Practice Act were taken.

No doubt, it will be entirely proper to call the attention of the court to decisions in England and New Jersey and other jurisdictions from which specific provisions of the new law are taken, but the effect of the decision in *Stehli Silks Corporation v. Kleinberg,* is to place the Civil Practice Act upon its own feet and to impose upon the judges sitting at Special and Trial Term, the mandatory duty of interpreting the new Act

and every part thereof in a liberal spirit in the interest of substantial justice.

A few instances illustrative of the use to which Section 105 has already been put are as follows: the amendment of a complaint at the trial, although the amendment substantially changed the cause of action (*Feizi v. Second Russian Insurance Co.* [App. Div. First Department], 199 App. Div. 775); certain defects in papers upon which order for service of the summons by publication was obtained (*Commercial Union of America, Inc. v. Ipranossian,* Whitaker, J., Supreme Court, Special Term, Part I, N. Y. L. J., January 10, 1922); defects in papers upon which order of arrest was obtained (*Auditore v. Cantanzaro,* Kapper, J., Supreme Court, Kings County, Special Term, Part I, N. Y. L. J., Dec. 13, 1921); defects in summons (*Schack v. Bryan,* 118 Misc. 90); transposition of "defendant" for "plaintiff" in notice of appeal (*Wolff v. Hubert,* App. Div. First Dept., 200 App. Div. 124).

When it is recalled with what minute precision compliance was formerly required with the provisions of the Code of Civil Procedure with respect to service of the summons by publication (*Whiton v. Morning Journal Assn.,* 23 Misc. 299), the extent of the progress that has been made will be more fully realized (as to defects in publication papers, see also *McCoy v. Erie Forge & Steel Co.,* Giegerich, J., Supreme Court, New York County, Special Term, Part I, N. Y. L. J., Feb. 21, 1922).

There are certain phases of Section 105 with reference to defects in the papers upon which provisional remedies may be obtained such as attachment, injunction and arrest, which I wish to postpone for further

consideration when we are taking up the specific matter of the provisional remedies.

Section 106 provides, "upon a motion for a new trial or upon appeal, an error in a ruling of the trial court must be disregarded if a substantial right of any party shall not thereby be affected." While new, this Section is not likely to make any substantial change in the law, as the appellate courts have for many years been directed to give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties (Code, Section 1317).

Section 110, however, is new and is quite important. This Section provides:

"No action or special proceeding shall fail or be dismissed on the ground of a mistake in the court in which the action or proceeding is brought, but in such case, a justice of the supreme court, upon such terms as may be just, may remove the action or proceeding to the proper court, by order. Where an order for removal is made as prescribed in this section, the subsequent proceedings must be the same as if the action or proceeding had been instituted in the court to which the removal is made."

As I read this section it appears to cover a case such as this: An action is brought in the Municipal Court of New York City for $2,000.00 whereupon the defendant makes proper application to the Municipal Court to dismiss the action on the ground that the court has no jurisdiction thereof, at which point the plaintiff, pursuant to Section 110 of the Civil Practice Act is supposed to have the right to make application to a Justice of the Supreme Court for the removal of the action to the Supreme Court.

While the effect of permitting such a removal is unquestionably just and equitable, it seems difficult to get around the question of jurisdiction involved. On the other hand, jurisdiction over the person of the de-

fendant has been properly obtained and this would seem to be sufficient to authorize a removal of the case to the Supreme Court even though the lower court had no jurisdiction of the subject matter.

There is a point in this connection which does not appear to have been definitely decided in this jurisdiction and which is one of great practical importance. A great many small claims are sued upon in the Municipal Court against express companies and railroad companies, based upon receipts or bills of lading which contain a short contract period of limitation amounting in some cases to one year, in other cases to two years and in a few instances to a period of only a few months. If an action is brought upon one of these claims just before the contract period of limitation expires and also before the statutory period of limitation expires, it is very plain that if the action is dismissed in the Municipal Court because the amount claimed is more than $1,000.00, the plaintiff is entitled to bring an action in the proper court within one year after the dismissal of his complaint. It is very doubtful, however, whether a similar rule would be applicable to the contract period of limitation prescribed in the receipt or bill of lading. It therefore becomes a matter of particular importance to sustain Section 110 of the Civil Practice Act and permit the removal of such a case to the Supreme Court, thus keeping it alive so as to avoid the claim that the contract period of limitation had expired and no new action could for that reason be brought.

Another entirely new section on the subject of mistakes, omissions and irregularities is Section 111, which is so important that I shall give it in full, as follows:

"Whenever in an action or special proceeding it shall appear at any stage of the proceedings, or upon appeal, that the appropriate remedy upon the facts pleaded or alleged, or proved, is different from that asked for in the pleadings or corresponding papers, the proceedings may be amended upon such terms as may be just, if jurisdiction exists to grant the proper remedy, and may be continued and determined by the court and at the term where then pending, or remitted to the proper term or court to be disposed of, in order that the relief may be finally granted which is appropriate to the facts, to the same extent as if the application had been in the first instance for the relief granted. The court may correct by amendment all defects and irregularities in matters of form or procedure and may bring in all parties necessary to completely determine the matter and award the appropriate relief upon the facts established."

Probably the instance of most frequent occurrence in connection with this section will be cases in which the facts stated in the complaint warrant an application for equitable relief, whereas, the prayer for judgment is for a sum of money only or *vice versa.*

This situation arose very frequently under the Code and caused the courts considerable embarrassment not merely because of the total absence of any provision in terms permitting the amendment of the pleading at the trial with respect to the prayer for relief, but particularly because such cases would almost invariably come up upon the wrong calendar for trial, which was supposed to create an insuperable difficulty. Originally, and indeed not so long ago, it was the practice to dismiss a complaint at Trial Term if the facts proved did not sustain the prayer for a money judgment, even though such facts did constitute a cause of action sufficient to entitle the plaintiff to equitable relief. The more recent Court of Appeals decisions, however, indicate that the trial court had ample power under the Code merely to strike the case from the calendar or transfer it to the proper calendar for trial. Even this procedure was manifestly inadequate as there appeared

no sufficient reason for the imposition of the inevitable delay in again bringing the cause up for trial.

Under Section 111 the court is given the power to permit an amendment of the prayer for relief and it is provided that the case "may be continued and determined by the court and *at the term where then pending,* or remitted to the proper term or court to be disposed of."

This seems to cover the instance where an equity case with a prayer for a money judgment comes up for trial at a Trial Term for the hearing of jury cases where there should be no difficulty in the trial court proceeding to hear the case as a judge sitting in equity, the panel of jurors being temporarily excused.

The reverse situation, however, is more difficult, as there appears to be no provision in the Civil Practice Act or the Rules of Civil Practice permitting a justice of the Supreme Court sitting at an Equity Term to requisition peremptorily one of the Trial Terms for a sufficient number of petty jurors to make it possible to try the action as an ordinary jury case. In such an instance, it would seem that the only relief which the court could grant would be to make an order transferring the case to the general Trial Term calendar.

There are a few other points with reference to mistakes, defects and irregularities which will be considered more fully in the subsequent lectures of this course. I refer to motion practice, trial practice and provisional remedies which will all be fully discussed in due time.

Complaint.

There is evidently no change in the essential requirements concerning the contents of the complaint as the

new section of the Civil Practice Act (Sec. 241) taken from the English Practice Act, which is applicable to pleadings generally, merely states the following rule which existed under the Code partially by legislative mandate and partially by judicial decision:

"Every pleading shall contain a plain and concise statement of the material facts, without unnecessary repetition, on which the party pleading relies, but not the evidence by which they are to be proved."

This is supplemented by Section 255 applicable specifically to the contents of the complaint, which requires no special comment.

One or two slight changes have been made, however, as Rule 90 now requires that the allegations of pleadings be divided into paragraphs "each as nearly as may be containing a separate allegation." As it is thus contemplated that the separate paragraphs shall be much shorter than was customary under the Code, the old requirement as to folios appears to have been omitted.

It is also important to notice that the provisions of the Code with reference to certain abbreviated forms of pleading are now inserted in the rules (Rules 92-98).

Joinder of Parties.

The changes in the Civil Practice Act on the subject of joinder of parties are extremely important and may be said to almost entirely supplant the provisions of the Code on that subject.

Of course there are a number of fundamental matters which have not been in any way changed. The general equity rule that the court would not proceed to decide a controversy where a complete determination

thereof could not be had without the presence of persons not parties to the record, has been retained in full (Section 193). A typical case illustrative of this rule is one where an action is brought to cancel a mortgage and only one of two joint mortgagees is made a party defendant. Obviously the court could not cancel the mortgage without affecting the rights of the other mortgagee, who is not a party to the record.

Another rule which may be regarded as fundamental and which has also been retained exactly as it existed under the Code, is the rule with reference to parties united in interest. Section 194 provides that parties united in interest must be joined as plaintiffs or defendants and that if the consent of any one who should be joined as a plaintiff cannot be obtained he must be included as a defendant. That this provision was wisely retained is well illustrated by the case of a debt owing to a partnership consisting of three persons. It would be very unfair to permit one of the partners alone to bring an action to recover the debt without joining the other two partners. The provisions with reference to those instances where one person may sue or defend on his own behalf and on behalf of others similarly situated have been retained intact (Sec. 195).

The provisions as to the general joinder of plaintiffs and defendants, however, have been entirely changed; and in connection with the whole subject it is well to bear in mind that Section 192 is controlling and makes it practically impossible for any controversy to be disposed of upon the technical ground of a misjoinder or defect of parties where it is practicable to drop a party improperly joined or to bring in as a party a person who has been erroneously omitted. Section 192 provides:

"No action or special proceeding shall be defeated by the nonjoinder or misjoinder of parties. New parties may be added or substituted and parties misjoined may be dropped by order of the court at any stage of the cause as the ends of justice may require."

This, of course, means that if in an equity case it appears at the trial that a necessary party defendant has not been brought in, the court is not required as heretofore to dismiss the complaint, but may hold the case and by a reasonable adjournment or such other order in the premises as may be just, afford an opportunity to the plaintiff to bring in the new defendant.

As to parties plaintiff, Section 209 permits the joinder of all persons "in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist whether jointly, severally or in the alternative, where if such persons brought separate actions any common question of law or fact would arise." Provision is also made for the direction that separate trials be had or such other order made as may be expedient where the joinder of many plaintiffs may embarrass or delay the trial.

When it is recalled that the Code permitted the joinder of plaintiffs only where they were all interested in the subject of the action and in the judgment demanded, it will be found that the new rule which is taken from the English Practice Act, Order XVI, Rule 1, marks a very important step in advance in our procedure.

Let us consider one or two illustrations. Suppose that A and B, complete strangers, are walking across Broadway, side by side and they are struck by an automobile negligently driven by X. Unquestionably Section 209 permits A and B, if they choose, to join together as plaintiffs in a single action against X, be-

cause there are several common questions of law or fact involved and their right to relief obviously arises out of the same transaction.

But it may be said that A and B may not desire to sue together. This, of course, involves a practical question which differs with every case which may arise. No doubt, in most cases it would be a foolish thing for two people injured in the same accident to sue together as I suppose the jury would be less likely to give a large verdict to each if their causes of action were tried together.

There is another case which arises quite frequently which seems to be covered by the new provisions, although it is not as clear as the one just discussed. It is a common practice among insurance companies when placing maritime insurance to have a large number of separate insurance companies write the policies for small amounts, the aggregate amounting to the value of the vessel insured. As a separate cause of action arises upon each of these policies, it was necessary under the Code to have separate actions brought against each of the separate insurance companies with the result of imposing the burden of expensive and harassing litigation upon the individual whose vessel was lost. I recently had such a case in which it was necessary for us to bring twenty-two separate actions against twenty-two separate insurance companies. All of the companies appeared by the same firm of attorneys and we were compelled to go to the extent of trying a great many of the actions separately. We were even put to the expense of arguing a number of separate appeals to the Appellate Division, although the evidence was identical in each of the cases. From the standpoint of the insurance companies they insisted

upon this procedure hoping to wear out the plaintiff, who needed the money badly, and thus induce him to settle for less than the full amount of his loss.

As Section 211, with respect to the joinder of defendants generally, provides that all persons may be joined as defendants, against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, and judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, I can see no reason why a single action could not be brought by the plaintiff in which the various insurance companies should all be joined as defendants.

Insofar as the question of joinder of causes of action is concerned, it would seem as though the above case of the insurance companies was the very sort of situation intended to be covered by Section 258 of the Civil Practice Act as it now reads.

This section looks at first blush as though it were an exact reproduction of Section 484 of the Code. In the next to the last paragraph thereof, however, the following very important words have been omitted:

"that they (the causes of action) affect all the parties to the action."

In other words, it is now no longer necessary, in order to join separate causes of action together in the same complaint, to show that they each affect all of the parties. It is, however, still essential to comply with the other requirements of the section so that ordinarily causes of action must belong to the same general category, except that claims arising out of the same transaction or transactions connected with the same subject of action may be joined even though they do not both belong to the same class of actions.

Applying these rules to the case of the insurance companies which I stated above, it will be found that all the claims are based upon contract so that they clearly come within Subdivision 1 of Section 258; and in addition they are claims "arising out of the same transaction." It would, accordingly, seem proper to join all of the insurance companies severally liable upon their separate policies of insurance as codefendants in the same action.

This proposition, however, is not entirely clear because the Civil Practice Act repeats *verbatim* in Section 216 the provisions formerly contained in Section 454 of the Code with reference to the joinder, as defendants, of persons severally liable on the same written instrument. In thus repeating, without change, the language contained in Section 454 of the Code, there is a very strong intimation that except where severally liable upon the same written instrument, persons severally liable may not be joined as defendants. It is true that there is no express statement to that effect, but the intimation is there.

There is a rather interesting discussion of this point in Wait's New York Practice Simplified, Volume I, page 349, as follows:

"At first glance, these two sections (Sections 211 and 212) would seem to give the plaintiff the right to join in one action as defendants, all persons against whom he has any claim whatever whether arising out of the same transaction or series of transactions or not. It is probable, though, that the courts will give a different interpretation to the sections than this. It seems as if in actual practice, the application of the sections will be limited so that those only can be joined as defendants against whom the plaintiff has claims arising out of the same transaction or series of transactions, or in which the same question of law or fact will arise. Certainly no good purpose will be served by a different rule, and much confusion might arise thereby."

Before leaving the subject of joinder of causes of action, there is one further illustration which I wish to give as it is a clear case of proper joinder of causes under the Civil Practice Act and is a typical case of improper joinder under the Code. This illustration is of particular interest to me as I made the mistake myself and it cost me $10.00 costs at the time. A client of mine had purchased a large shipment of electrical machinery from the General Electric Company of a value of approximately $40,000, and had given shipping directions that the machinery be delivered on board the steamer Mexico of the Ward Line. The General Electric Company made the delivery, but negligently took a receipt from the Ward Line in which no value of the goods was stated, the receipt containing the usual clause fixing the value at $100. As this large shipping case, weighing several tons, was being lifted aboard the steamer, something broke and the electrical machinery sank to the bottom of the river. I found upon investigation that it was very doubtful whether or not the Ward Line was liable for an amount greater than $100 and yet I found a few decisions which indicated that there was some chance of recovery on the ground that the size of the case and its markings were such as to notify the Steamship Company that the shipment was of a value much greater than $100.00. It was very plain to me, however, that if the Ward Line was not responsible, then the General Electric Company was responsible, because of its neglect in taking an improper receipt. Accordingly, I sued both the General Electric Company and the Ward Line setting forth the facts very fully in the complaint. To my dismay and discouragement a demurrer was promptly served on the ground that the two causes of action as alleged did

not affect all of the parties to the action as required by Section 484 of the Code. This contention of the defendants was well founded and I was thus compelled to make an election as to which of the two I should continue to proceed against. Under Section 258 of the Civil Practice Act no such election would be essential.

There is one additional feature of Section 258, however, which might well be slightly broadened and that is with reference to causes of action not falling within one of the other subdivisions of the section, but which are "upon claims arising out of the same transaction, or transactions connected with the same subject of action." There has been considerable doubt as to what was meant by the words "same transaction" and "same subject of action," and it would seem desirable to substitute language similar to that used in Section 209 of the Civil Practice Act with reference to the joinder of plaintiffs generally. In other words, Subdivision 9 might well provide for the joinder of "claims arising out of the same transaction, *or series of transactions,* or transactions connected with the same subject of action."

Returning to the matter of joinder of parties, there are two additional sections with reference to the joinder of defendants which are of the utmost importance. They are both taken from the English Practice Act and are as follows:

"Sec. 212. Defendant need not be interested in all the relief claimed.

It shall not be necessary that each defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the court may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest."

"Sec. 213. Where doubt exists as to who is liable.

Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, to the extent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between the parties."

A typical case arising under Section 213, is as follows: X, having had dealings with A is informed that A acted as the agent of B and he was so informed at the time he made the contract with A; being in some doubt about the matter, however, X hesitates as to whether to bring an action against A or to bring an action against B. Section 213 permits X to sue both A and B and ask for a judgment in the alternative against either A or B.

This provision was a very necessary one, as a number of cases arose under the Code where in the hypothetical case just given X sued A and was defeated upon the ground that A was merely acting as an agent; whereupon X sued B and was again defeated upon the ground that B in no sense authorized A to act as his agent. The possibility of such an unfortunate result is entirely eliminated by Section 213. It is also worth while remembering that it is the practice in New Jersey under a similar section to have the title of the action read "X, plaintiff, against A and/or in the alternative B, defendants."

The provisions of Section 213 have been somewhat fully discussed in the recent case of *Wilson v. Alland Bros. & Co., Inc.*, on a motion to sever the causes of action alleged against the two defendants in the alternative, the motion being decided by Mr. Justice Valente at Special Term, Part I, of the City Court of New York City (N. Y. L. J., May 17, 1922). In that case the complaint set up two separate and distinct

causes of action, one against each of the two defendants, neither defendant being in any way connected with the cause of action alleged against the other. Supposing that the defendants are A and B, the claim against defendant A was for breach of warranty in the sale of certain goods, A basing his refusal to pay the damages which had been sustained by the plaintiff because of the fact that A had delivered to B, who was a warehouseman, and had on deposit with B a quantity of goods in an amount of the size, quality and description sufficient to fill the plaintiff's order, but that B did not deliver the proper goods to the plaintiff as ordered by A. In granting the motion of A to sever the action, it was held:

"While the damages resulting might be the same against each defendant, the plaintiffs here attempt to join a cause of action solely against one defendant with a cause of action solely against the other defendant. This is not a case where a cause or causes of action alleged in the complaint concern defendants either jointly or severally or in the alternative so that judgment may be given against one or more of the defendants as may be found to be liable according to their respective liabilities, but the complaint states two distinct and separate causes of action, each against one defendant, and to which the other is not a party either jointly, severally or in the alternative (Sec. 211, Civil Practice Act)."

It is also to be noted that there have already been several decisions on the question of parties where the courts at Special Term have very fully considered and followed the English decisions construing the same language as it appeared in the English Practice Act (*Bristol Manufacturing Co. v. Zahn,* Sup. Court, New York County, Spec. Term, Part IV, Mullan, J., N. Y. L. J., Apr. 11, 1922; *137 East 66th Street, Inc. v. Lawrence,* Sup. Court, New York County, Spec. Term, Part I, Bijur, J., N. Y. L. J., Apr. 19, 1922).

This raises a question of considerable interest and

importance, namely, how far will our courts feel bound by the English decisions construing identical language now appearing in the Civil Practice Act and taken from the English Practice Act. The same question in different form arises, I take it, in connection with the foot notes which the Joint Legislative Committee has prepared with reference to the various sections of the Civil Practice Act. The rule covering both cases should be that the English authorities and the foot notes of the Joint Legislative Committee and the decisions of the courts of any other state from which portions of the Civil Practice Act have been taken are merely persuasive authorities, and are in no sense really binding upon our courts here in New York.

There is one additional feature of the question of joinder of parties. I have reference to the bringing in of new parties, either upon the motion of a person who is already a party to the record or upon the motion of a stranger who desires to intervene and be made a party.

With reference to an application by a stranger for permission to intervene, Section 193 of the Civil Practice Act states the rule which obtained under the Code, namely, that a person not a party to the action might make application to be made a party where he "has an interest in the subject thereof, or in real property, the title to which may in any manner be affected by the judgment, or in real property for injury to which the complaint demands relief." This language had been frequently construed under the Code and it was well settled that in an action for a sum of money only a stranger might not intervene even though he appeared to have a general interest in the controversy (*Bauer v. Dewey,* 166 N. Y. 402). The reasoning upon

which this line of cases was based is that the rule with reference to the making of the motion to intervene by a stranger to the record was taken from the old Chancery Practice and accordingly should be restricted to equity cases and cases where specific property was involved.

By Chapter 624 of the Laws of 1922, Section 193 of the Civil Practice Act was amended so as to add the following sentence, which will take effect on September 1, 1922:

"And where one of the parties to an action claims that a person not a party thereto is or will be liable wholly or in part, for the claim made against him in the action, the court on application of such party must direct such person to be brought in and direct the service upon such person of the pleading, alleging the claim against him."

This new portion of Section 193 apparently requires no comment and is merely a logical extension of the liberal rules as to parties, which had already been included in the Civil Practice Act.

Before leaving this subject, I wish to refer to a few recent decisions indicating the degree of liberality with which a judge, who is so disposed, may interpret and apply Section 192 of the Practice Act. In *Kossman v. Samuel,* Sup. Court, New York County, Spec. Term, Part III, Mullan, J., N. Y. L. J., Mar. 29, 1922, which was an action pending prior to October 1, 1921, a demurrer was interposed and in deciding the demurrer Mr. Justice Mullan held:

"I shall apply the Civil Practice Act (secs. 192, 193) to the extent of directing, in the order to be made herein, that Meyers and Reingold be brought in without separate motion made for that purpose. New pleadings to be served on all defendants old and new."

The question has also arisen with respect to the substitution of one party plaintiff for another. It will

be recalled that it was very well settled under the Code that one plaintiff could not be substituted for another in an action where there was only one plaintiff to begin with (*N. Y. S. M. Milk Pan Ass'n v. The Remington Agricultural Works,* 89 N. Y. 22). In *Pelzer v. United Dredging Co.,* 200 App. Div. 646, the action was originally brought by an administratrix appointed by a Mexican court, the notes sued upon having been owned by a resident of Mexico. An application was made by the defendant for judgment on the pleadings upon the ground that the plaintiff as administratrix appointed in Mexico, whose government had not been recognized by our Federal authorities, had no legal capacity to sue in our courts, and the justice at Special Term in granting the motion for judgment gave leave to the plaintiff to serve an amended complaint. A separate motion made by the plaintiff was granted permitting the plaintiff to serve an amended or supplemental complaint setting up her subsequent appointment as administratrix by the Surrogate of New York County. This was permitted at Special Term on the theory that it was not necessary to begin a new action as the claim that the Mexican administratrix was a different person in contemplation of law from the New York administratrix, was a legal fiction or theory which might be conveniently disregarded. The Appellate Division of the First Department reversed the order saying (p. 648),

"Under the guise of an amended or supplemental complaint, May S. Pelzer, an original appointee as administratrix by one of the surrogates of New York county under limited letters of administration, issued after this action had been commenced, has been injected in this action as plaintiff in place of May S. Pelzer, administratrix appointed by a Mexican court, seemingly upon the theory that the New York letters were ancillary to the Mexican letters. But the letters granted by the Surrogate's Court are not ancillary to any original letters elsewhere issued. Indeed, if they

were ancillary to those granted in Mexico, the Surrogate's Court would have had no authority to issue them, for the same reason which prompted the dismissal of the complaint in this action. A substitution of parties is only permissible where one has lawfully succeeded to the rights and interests formerly held by another party. But the New York administratrix has not derived any rights from the original Mexican administratrix, and hence must be regarded as an independent official, despite the fact that May S. Pelzer happens to be the same individual who was appointed as administratrix in the unrecognized jurisdiction.

We may also add that there was no motion to substitute the New York administratrix for the Mexican administratrix. The motion was to permit plaintiff to serve an amended complaint where there was nothing to amend. Having denied plaintiff access to our courts, it would be anomalous to entertain her motion to amend her complaint by ousting her from the action and substituting as plaintiff some one else in her stead."

It thus appears that where some inadvertent mistake has been made the interests of justice may require a substitution of one plaintiff for another under special circumstances; but there appears to be no authority for permitting the wholesale change of parties for purely arbitrary reasons upon the claim that Section 105 and Section 192 authorize such change (*Bellok v. Ninth Avenue Ry. Co.*, Spec. Term, Part I, City Court of New York City, Schmuck, J., N. Y. L. J., Dec. 13, 1921).

There are a few other cases on this same subject which are worthy of brief discussion.

On February 28th, 1922, an action entitled "U. T. Hungerford Brass & Copper Co. v. Walker D. Hines, as Director General of the United States Railroad Administration" was commenced in the Supreme Court of New York County by the service of the summons on Frank E. Hall, it appearing that at the time of the service of the summons, Walker B. Hines was not the Director General of Railroads and that the action should have named as defendant James C. Davis who had been appointed, pursuant to Section 206a of the

Transportation Act of 1920, for the express purpose of having all such actions brought against him instead of naming Walker B. Hines, as had theretofore been done. It appeared that Frank E. Hall, although not authorized to accept service for Walker B. Hines, was authorized to accept service for Davis. Under these circumstances the defendant, appearing specially, made a motion to set aside and vacate the attempted service of the summons on the ground of the mistake in naming Walker B. Hines as defendant, instead of James C. Davis. The plaintiff contended that the mere misnomer of the defendant did not in any way affect the commencement of the action and a cross motion was made by the plaintiff to amend the summons and all subsequent papers and pleadings to read "U. T. Hungerford Brass & Copper Co. v. James C. Davis, Director General of Railroads as agent under Section 206a of the Transportation Act, 1920." These motions came on for argument before Mr. Justice Cohalan at Special Term, Part I, of the Supreme Court, New York County (N. Y. L. J., May 13, 1922), and he granted the plaintiff's motion to amend and denied the motion of the defendant to vacate the service of the summons, saying:

"I think the party served sufficiently identified and connected with the party designated by the statute, to hold the service good. All the facts accompanying the service of the summons sustain this view."

In *Adelmann v. Lamb,* a motion was made by the plaintiff just before the case was about to be reached for trial, for leave to amend his complaint and to bring in as a party plaintiff the corporation of which the original plaintiff was the president. The affidavit upon which the motion to amend was made contained

a statement that the original plaintiff had not made the contract sued upon for himself, but for the corporation, and that the action had been brought in its original form only because the attorney for the plaintiff assumed that the plaintiff individually had made the contract. This motion came on for argument before Mr. Justice MacCrate at Special Term in Queens County (N. Y. L. J., Apr. 6, 1922), and in denying the motion he said:

"Without the citation of authority, but relying solely upon the provisions of section 192, C. P. A., plaintiff makes this motion. That section is not as broad as the provisions of Rule 2 of Order 16 of the English Practice Act, which specifically states that where there is a wrong plaintiff by reason of an honest mistake the right plaintiff may be substituted. In construing that rule, however, the English courts do not seem to have permitted the substitution in cases other than where it was doubtful, upon a given state of facts, which of two persons should sue. There is a wide distinction between assuming because of incomplete inquiry a person has a right to sue and concluding that a person has a right to sue when all the facts are disclosed."

LECTURE III.

Answer.

There have been a number of changes with respect to the answer. To begin with, the old and unnecessarily technical rule requiring in many cases the repetition of denials in the various separately stated affirmative defenses in the answer has been abolished and Rule 90 now provides that "any fact once denied shall be deemed denied for all purposes of the pleading." Furthermore, it has recently been held by the Appellate Division, First Department, that denials so repeated shall be stricken out under Rule 103 of the Rules of Civil Practice as "unnecessary" (*Blackwell v. Columbia Trust Co.*, 192 N. Y. Supp. 226).

A much more important matter is the new rule concerning the pleading of affirmative matter. Section 242 provides:

> "The defendant or plaintiff, as the case may be, shall raise by his pleading all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defense or reply, as the case may be, which if not raised would be likely to take the opposite party by surprise or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, statute of limitations, release, payment, facts showing illegality either by statute, common law or statute of frauds. The application of this section shall not be confined to the instances enumerated."

Apparently it is not intended seriously to disturb the old rule of common law pleading with respect to defenses in confession and avoidance. In other words, in the vast majority of cases now arising it will be necessary for the defendant to plead affirmatively in his answer facts which constitute a defense substan-

tially upon the basis of admitting the facts as alleged in the complaint. The enumeration in Section 242 of such typical instances as statute of limitations, release, payment and so on, is expressly stated to be merely by way of illustration.

It is to be noted, however, that this apparent restatement of the old rule as to confession and avoidance is coupled with the statement in the *conjunctive* "and all such grounds of defense or reply, as the case may be, which if not raised would be likely to take the opposite party by surprise or would raise issues of fact not arising out of the preceding pleadings."

I confess that I am somewhat puzzled by these provisions of Section 242, although I suppose the intention is to require the defendant now to plead not only such matters as were required to be pleaded under the Code, *but also* to plead affirmatively any facts which if not raised would be likely to take the plaintiff by surprise. That this section is likely to produce confusion seems very probable.

Let us suppose, for example, that a defendant intending to rely upon certain facts which were plainly admissible under a general denial under the Code, pleads such facts as a separate defense because he does not wish to be met at the trial with a claim on the part of the plaintiff that the plaintiff is surprised by the evidence offered by the defendant. Is it contemplated that this particular separate defense is subject to a motion to strike out on the ground that it does not state facts sufficient to constitute a defense? Apparently not, and it was so held by Mr. Justice Cohalan in *International Time Recording Co. of N. Y. v. Waverly Machine & Tool Co.* (Sup. Court, New York County, Spec. Term, Part I, N. Y. L. J., May 9th, 1922).

As a practical matter, however, it is very probable that little real difficulty will be experienced with Section 242, although it is likely to lead to a very loose and haphazard method of pleading.

Turning to the matter of counterclaims, we find that the general provisions with reference to counterclaims have been preserved intact. There is one extremely important and interesting change. Counterclaims may now be inserted not only on the basis of a claim in favor of the defendant and against the plaintiff, or in favor of one of the defendants against one or more of the plaintiffs, but as is now provided in Section 266, the counterclaim may be in favor of the defendant or of one or more defendants and against the plaintiff, *together with any other person or persons not parties to the record at all.* This provision is strictly in accordance with the general system of the Civil Practice Act with reference to parties generally. There is, however, one very peculiar feature of the matter and that is the provision contained in Section 271 with respect to the manner of obtaining jurisdiction over the persons brought into the case by a counterclaim demanding judgment against the plaintiff and such new party or parties.

Section 271 provides:

"Where any such person is not a party to the action he shall be summoned to appear by being served with a copy of the answer. A person not a party to the action who is so served with an answer becomes a defendant in the action as if he had been served with the summons. Any such person named in an answer as a party to a counterclaim may reply thereto within the time within which a defendant might serve an answer to a complaint, or he may serve a notice of appearance on the party interposing the counterclaim."

At first reading this provision, which is taken from the English Practice Act and the New Jersey Practice

Act, seems quite revolutionary and unsatisfactory. Certainly, to merely serve upon a stranger to the record a copy of an answer which contained denials, various separate defenses and finally at the end a counterclaim in which a judgment is requested against the plaintiff and against the person who is so served with the copy of the answer, would scarcely appear to give him the necessary notice which due process of law requires.

This difficulty, however, has been easily remedied and the practice now is to serve with the copy of the answer a form of notice briefly stating that a claim is made against the person so served and informing him generally with respect to his right to serve a reply or to appear. This practice apparently has received judicial sanction in *National Park Bank of New York v. Union Bank of Canada,* Sup. Court, New York County, Spec. Term, Part V, Lydon, J., N. Y. L. J., Apr. 26, 1922; see also *Lash v. Indemnity Insurance Co.,* Sup. Court, Kings County, Spec. Term, Part I, Benedict, J., N. Y. L. J., Mar. 11, 1922.

There is another rather interesting point in reference to counterclaims. It will be recalled that under the Code the plaintiff was required to raise by demurrer certain points with reference to the counterclaim, but he could preserve for use upon the trial not only the claim of general insufficiency and lack of jurisdiction of the subject matter, but also the point that the counterclaim was not a proper counterclaim. According to Section 278 of the Civil Practice Act the point that the counterclaim is not one which may be properly interposed in the action is waived unless promptly presented by motion as provided in the rules.

A curious point was recently raised in *Sternstein v.*

State Bank, before Mr. Justice Fawcett at Special Term, Part I, of the Supreme Court, Kings County (N. Y. L. J., May 24, 1922), where the plaintiff made a motion to compel the defendant to reply to the plaintiff's reply to the counterclaim, certain affirmative defenses having been set up in the plaintiff's reply. The plaintiff's argument was based upon Section 274 which provided generally that "where an *answer* contains new matter constituting a defense by way of avoidance, the Court, in its discretion, on the defendant's application, may direct the plaintiff to reply to the new matter." The plaintiff argued that as the Civil Practice Act should be liberally construed, the word "answer" should be interpreted to mean "answer or reply." The motion was denied, and I think properly so, as the contention of the plaintiff went considerably beyond the point of merely construing the Civil Practice Act in a broad and liberal spirit.

While not strictly applicable to the answer itself there are a few incidental matters which have in the past been usually discussed in connection with the answer and they may as well be disposed of at this time.

You will recall that pursuant to Section 1778 of the Code, in an action against a corporation to recover damages for the nonpayment of a promissory note or other evidence of debt, it was necessary for the defendant to serve with the answer or demurrer, a copy of an order directing that the issues presented by the pleadings be tried; and it was also provided in that same section that an order extending the time to answer or demur in such an action should not be granted, except upon notice.

The requirement that a copy of an order be served

with the answer has been entirely abolished, as it never did serve any useful purpose, the order was granted ex parte almost as a matter of course, and the provision simply presented an occasion to seasoned practitioners to take advantage of the ignorant or unwary tyro who did not happen to know that an order was required.

Strangely enough, however, I am informed that there was considerable opposition to the repeal of this portion of Section 1778 of the Code and that as a concession to those who objected to its repeal, there has now been included in the Civil Practice Act Section 252 which requires the answer to be verified in every action against a corporation to recover damages for the nonpayment of a promissory note or other evidence of debt, even though the complaint be unverified.

With reference to the other portion of the old rule relating to extensions of time, the Convention for the Formulation of the Rules of Civil Practice has very wisely adopted Rule 86 which provides that in every action against defendants, whether corporate or otherwise, brought upon a promissory note or other written evidence of debt for the unconditional payment of money payable on demand or at a specified time, no order extending the time to plead shall be granted without notice of at least two days to the plaintiff's attorney.

In this connection it is well to make careful note of Rule 87 which provides that where the time to serve a pleading has been once extended by stipulation or order, no further extension may be obtained ex parte. This provision is applicable to all actions and has put a stop to the old practice of first applying ex parte for a nineteen day extension of time and then applying

later for a further extension ex parte of twenty days; which could be done under the old General Rules of Practice.

It is important to fully understand Rule 87 because a shrewd attorney representing the plaintiff might, by glibly consenting to a stipulation extending the defendant's time to answer one week, make it incumbent upon the attorney for the defendant to make any further applications for extensions of time upon notice, thus depriving the defendant of the privilege which he had from the start of getting one extension of twenty days ex parte.

Verification.

There have been two changes with reference to the verification of pleadings one of which is merely by way of clarification and the other of which is quite important. Both of these changes are contained in Rule 99 and, with the exception of Section 252 to which reference has already been made, the sections of the Civil Practice Act with reference to verification are practically a repetition of the provisions contained in the Code.

In subdivision 1 of Rule 99, it is expressly provided that if the party be a domestic corporation the verification must be made by an officer thereof *which shall be deemed a verification by the party.* This clears up a point which has caused a great deal of discussion at the bar as to whether a verification by an officer of a domestic corporation should set forth the reasons why the verification was not made by the party and the grounds of the belief of the deponent as to all matters not stated upon his knowledge. This point has been

judicially determined for many years (*High Rock Knitting Co. v. Bronner,* 18 Misc. 627), but the present clear statement of the matter is a decided improvement upon the ambiguous language contained in Section 525 of the Code.

A substantial change of importance is embodied in subdivision 3 of Rule 99 which states as a ground for verification by an attorney the absence of the party from "the county where the attorney has his office."

This change reminds me of a mistake I once made which gave me the scare of my life. I had prepared an answer on behalf of a defendant who was spending the summer in Vermont although she was a resident of New York County. I was then employed as a law clerk and prepared the verification for signature by one of the members of the firm who resided in Kings County. The law office in which I worked was in New York County. As the ground of verification I stated that the party was without the county where deponent had his office. To my astonishment the answer was returned the next morning with a notice to the effect that it was treated as a nullity and that judgment by default would be entered forthwith. Upon consulting the Code, I found that the Code provision was that the attorney might verify where the party was without the county where the lawyer *resided,* unless the lawyer were a non-resident of the State, in which event it was only necessary to show that the party was without the county where the lawyer had his office. This rule of the Code, of course, made it possible for the attorney to verify the pleading even though the client might be sitting beside him in his law office. The present rule is much more sensible.

Motions With Reference to Pleadings.

For those of us who had become accustomed to make all motions in reference to pleadings returnable at Special Term, Part I, in New York County, except motions for judgment upon the pleadings or for the trial of issues of law brought on to be heard as contested motions under Section 976 of the Code which were returnable at Special Term, Part III, except in the summer time, it is important to notice that the amended Special Term Rules for the First Department now provide that motions upon pleadings made under Rules 102, 103, 104, 107 and 110 of the Rules of Civil Practice, shall be noticed for Special Term, Part I; and applications for judgment upon the pleadings under Rules 106, 109, 111, 112, 113 and 114 of the Rules of Civil Practice shall be noticed for Special Term, Part III (amended Special Term Rules II and III). It is also to be noted that there is a special rule applicable to Special Term, Part I, New York County, requiring motion papers to specify whether the motion is made under the Civil Practice Act or under the Code of Civil Procedure and motions on the pleadings made under Rules 102, 103, 104, 107 and 110 must contain a notation on the motion papers as to the particular rule under which the application is made.

Most of the motions with reference to pleadings are now contained in Title 14 of the Rules under the heading of Pleadings. Motions with reference to sham pleadings and frivolous pleadings are now combined under Rule 104. The rule is couched in somewhat different language, but it is not apparently intended to make any substantial change in the law. Instead of being a motion to strike out a sham answer or a sham defense or to give judgment upon a frivolous

answer or reply, the motion is now in terms a motion for an order to "treat the pleading as a nullity and give judgment accordingly." In view of the rule with reference to a motion for judgment on the pleadings after issue joined (Rule 112), and the rules with reference to a motion for summary judgment where an answer has been served (Rules 113 and 114), it is not likely, as a practical matter, that very much recourse will be had to Rule 104.

Rule 103 with reference to striking out matter contained in a pleading has very much broadened the provisions applicable under the Code to such a motion. It will be recalled that Section 545 of the Code provided for a motion to strike out irrelevant, redundant and scandalous matter. Rule 103 now permits to be stricken out "sham, frivolous, irrelevant, redundant, repetitious, unnecessary, impertinent or scandalous" matter or any matter which "may tend to prejudice, embarrass or delay the fair trial of the action."

There are accordingly now two provisions with reference to sham pleadings: first, the general provision with reference to a sham or frivolous answer or reply contained in Rule 104 and second, the reference in Rule 103 to a motion to strike out *any matter* contained in a pleading which is shown to be sham. We thus find not merely a repetition of the old authority of the Code to strike out an entire answer and give judgment where the answer is false, but a particular provision directly authorizing the court to strike out a specific denial or allegation as sham. Of course, even under the Code, it was not an unusual thing for the courts to strike out as sham specific denials for lack of any knowledge or information sufficient to form a belief (*Kirschbaum v. Eschmann,* 205 N. Y. 127; *Dahlstrom v. Gemunder,*

198 N. Y. 449); and in all probability the present wording of Rules 103 and 104 may be regarded merely as a clarification of the law rather than the creation of entirely new provisions.

A very interesting question arises in connection with Rule 103. One of the grounds of criticism of the Civil Practice Act is that it may lead generally to a very loose and inartificial system of pleading and that shrewd and unscrupulous practitioners may take advantage of the great liberality permitted by the new system to so prepare their pleadings as to obscure the issue rather than merely to set forth a plain and concise statement of the facts which are alleged to constitute the cause of action or defense. If the broadening of the subject matter of Rule 103 is intended to indicate a disposition on the part of the courts to strike out all really unnecessary matter from pleadings themselves, this will go far to serve as a check upon persons who would prefer to take undue advantage of the liberal provisions of the Practice Act with reference to pleadings generally. In this connection it is significant to notice that the Appellate Division of the First Department has already reversed an order of the Special Term denying a motion to strike out as unnecessary certain denials repeated in an answer containing a number of affirmative defenses (*Blackwell v. Columbia Trust Company,* 192 N. Y. Supp. 226).

In Rule 112 with reference to motions for judgment on the pleadings after issue joined, there is a slight change which is of considerable practical importance. It will be recalled that under the Code if the plaintiff moved for judgment on the pleadings, it was essential for the defendant to make a counter motion for judgment on the pleadings in order to be in a position to

effectively raise the question of the general insufficiency of the complaint. It was so held in *Fosmire v. National Surety Co.*, 229 N. Y. 564, where it was said,

"The Special Term properly denied the plaintiff's motion for judgment on the pleadings, but, in the absence of a counter-motion by the defendant, it erred in going farther and dismissing the complaint."

With this decision in mind, the following clause at the very end of Rule 112 becomes of considerable importance, namely, "and without regard to which party makes the motion." In other words whichever party makes the motion for judgment on the pleadings, the court before whom the motion comes on for argument is now in a position to fully dispose of the matter by not merely granting or denying the motion but by directing judgment accordingly, with the usual permission to serve an amended pleading upon terms in a proper case.

For some strange reason most of the provisions with reference to bills of particulars are contained in the body of the Civil Practice Act itself (Sections 246, 247). These sections are merely a repetition, without change, of the provisions formerly contained in Section 531 of the Code. There are two rules with reference to bills of particulars, however (Rules 115, 116), one of which provides that where a demand for the delivery of a bill has been made, but not complied with, then upon the granting of a motion for the bill, the court "may impose costs of the motion." The other rule merely provides for the verification of the bill and in this respect seems to make no change in the law.

I had supposed that even under the Code the Court plainly had the power and was normally expected to impose motion costs upon the granting of a motion for

a bill of particulars, where a previous demand had been served and disregarded. Considerable importance seems to be placed, however, on the new rule in this respect which was strongly relied upon by Mr. Justice Wendel at Special Term, Part I, of the City Court of New York City in *Polakoff v. Mme. Juliette Embroideries, Inc.* (N. Y. L. J., Dec. 23, 1921), where an effort was made to resettle the order by omitting the provision imposing costs.

Motions in lieu of demurrers.

As most of you are probably already aware, demurrers have been abolished (Section 277) and objections to pleadings in point of law are now made by way of motion. In view of the various rules covering this subject, it may now be said that with the abolition of the demurrer all issues of law as such were also abolished. You will recall that issues of law were always raised by demurrer not only under the Code, but in common law pleading as well. It is a significant fact that the Legislature in 1921 was very careful to delete from the Civil Practice Act the words "issue of law" wherever the same appeared. You will find this to be the fact by referring to Sections 284, 421, 423, 427, 432, 442 and 443 of the Civil Practice Act as originally passed in 1920 and as repealed or amended by the Legislature in 1921.

It thus appears that the motions with respect to pleadings which are about to be discussed in no sense raise issues of law, but do raise "points of law." This being so, I have considered the question as to whether notices of trial ought to be prepared in a new form omitting the words "issues of law," but this change is apparently not contemplated by the rules, as Rule 151

with respect to notes of issue still requires a statement of "the nature of the issue, whether of fact or of law." This portion of Rule 151 is apparently inconsistent with the amendments to the Civil Practice Act made in 1921 to which reference has already been made. The point is not of great importance, however, insofar as notices of trial and notes of issue are concerned, as I can see no possible harm in following the old forms as to both of these papers.

You will recall that Section 488 of the Code with relation to demurrers specified eight grounds of demurrer, namely, where it appeared on the face of the complaint that there was no jurisdiction of the person of the defendant, no jurisdiction of the subject of the action, no legal capacity in the plaintiff to sue, other action pending, misjoinder of parties plaintiff, defect of parties plaintiff or defendant, misjoinder of causes and general insufficiency.

Each of these eight points of law may still be raised by motion, but the manner of raising these points has been changed and they have been broadly divided into two classes. Rule 102 which is entitled motions to correct a pleading, includes not only the old motion to make the pleading more definite and certain, but also three of the former grounds of demurrer, namely, misjoinder of parties plaintiff, defect of parties plaintiff or defendant and misjoinder of causes. In raising these points, accordingly, the motion should be characterized as one to correct a pleading.

On the other hand, the remaining five grounds of demurrer under the Code are now included in Rule 106, which is a "motion for judgment dismissing the complaint, or one or more causes of action stated therein." This distinction in form may not appear important on

the surface; but it is well to be correct and precise in such matters and to understand the difference between a motion to correct a pleading and a motion for judgment dismissing the complaint. The reason for the difference is quite plain. It is the theory of the Civil Practice Act to place mistakes with reference to parties and the joinder of causes in a special class and to provide a remedy for such mistakes which shall be applied with the greatest liberality. The remaining objections heretofore raised by demurrer such as lack of capacity in the plaintiff to sue, other action pending, jurisdiction and general insufficiency, are much more serious questions and are accordingly now disposed of by a motion for judgment dismissing the complaint.

Very little additional discussion is necessary in connection with Rule 102, as Rule 105 requires this motion to be made within twenty days after the service of the pleading to which the motion is addressed, and the decision will direct the party to serve such amended pleading as the nature of the case may require.

With reference to motions under Rule 106, however, the rules which obtained under the Code have been preserved almost intact. In other words, unless raised by motion, which must be made within twenty days after the service of the pleading (Rule 106), the defect is waived except where the objection relates to the jurisdiction of the court or general insufficiency (Sections 278, 279). An objection on the score of a mistake as to parties or joinder of causes of action is also waived, unless promptly taken by motion under Rule 102 (Section 278).

It will be recalled that in a few well defined instances a defect of parties may be so important and fundamental as to entirely deprive the court of the power to

dispose of the controversy, as in equity cases where it appears at the trial or at any other time prior thereto, that a complete determination of the case cannot be had without necessarily affecting the rights of persons not made parties to the record (Section 193). In such a situation as this the failure to raise the point by motion within twenty days after the service of the complaint would not amount to an effective waiver. The court at the trial, or otherwise, however, could pursuant to the direction contained in Section 192 direct that the missing parties be brought in.

A motion under Rule 106 may be stated in the general language of the rule where based upon general insufficiency, lack of jurisdiction or other action pending; but when based upon some other defect, the objection must be more particularly specified in detail (Section 280).

Following out the scheme of these motions as just outlined, Section 282 provides that the service of an answer or reply to a pleading to which a motion has been addressed, shall be deemed an abandonment of the motion.

As to the disposition of the motion, Section 283 provides that if the objections to a pleading raised by motion are not sustained then the moving party may serve his pleading "before the expiration of ten days after service of notice of the entry of the order deciding the motion, unless the court shall be of the opinion, to be stated in the order, that the objections are frivolous." This portion of Section 283 will have a very excellent effect as it will place the person making a motion, which raises a point of law with reference to a pleading, in a position where he will not have to worry about obtaining a stipulation or special order extending his

time to serve his answer or reply until after the determination of the motion. In a normal case, as stated in Section 283, the defeated party will have ten days as a matter of right within which to serve his pleading. What is the meaning, however, of the additional clause which provides that "unless the court shall be of the opinion, to be stated in the order, that the objections are frivolous"? There are two possible constructions: (1) that if the court shall determine that the motion is frivolous the court may cut down the time of the moving party within which to serve his pleading from ten days to five days or two days or even one day; or (2) that in such event the court has power to entirely deprive the moving party of the right to serve any pleading and thus in effect put him in default. It is my opinion that the second interpretation is not justifiable as it would be too harsh a penalty for the making of a frivolous motion and seems out of keeping with the general scheme of the Civil Practice Act. To give the court the power to cut down the time of the moving party within which to serve his pleading to five or even one day after service of a copy of the order with notice of entry, would seem to be ample punishment for the making of an improper motion.

If the moving party succeeds, then Section 283 merely repeats the rule which obtained under the Code that the court upon sustaining the objection raised by the motion "may allow the party in fault to plead anew or amend, upon such terms as are just." The word "may" would seem to indicate that the court in sustaining the objections still has the power, in a proper case, to refuse the privilege of serving an amended pleading.

There is another point which had become clearly

established law under the Code and which seems to be equally applicable under the Civil Practice Act. I refer to the rule stated in the case of *De Puy v. Strong,* 37 N. Y. 372, which was that under the Code, if a defect appeared upon the face of the complaint which presented a ground of demurrer other than jurisdiction or general insufficiency, the defendant was required to raise the point by demurrer and he was not permitted to raise the point by defense in the nature of a plea in abatement in his answer except in the single instance where such defect did not appear upon the face of the complaint. This rule still obtains under the Civil Practice Act, as such a defect if it appears upon the face of the complaint must be raised by motion within twenty days (Sections 278, 279); whereas, if the defect does not appear upon the face of the complaint, it may be raised by answer under Section 242 or by a motion under Rule 107 which will be more fully discussed in the next lecture.

LECTURE IV.

Motion for judgment under Rule 107.

While the provisions as to motions in lieu of demurrers are important, it would seem as though the changes were largely matters of form. They involve it is true some simplification of the practice, but substantially they repeat in slightly different form the old system of demurrers under the Code. Rule 107, however, provides for an entirely new remedy *where the defect does not appear on the face of the complaint,* in the form of a motion by the defendant for judgment dismissing the complaint or one or more causes of action stated therein upon nine separate grounds. This motion presents questions of law and questions of fact as well, and is made upon the complaint *and an affidavit* stating facts tending to show that the action is not maintainable because of four of the points included in Rule 106, namely, no jurisdiction of the person or the subject of the action, no legal capacity in the plaintiff to sue, and other action pending; and in addition, where the evidence contained in the affidavit indicates that any of the following defenses to the action exist, namely, res adjudicata, statute of limitations, release, statute of frauds and infancy and other disability.

As will at once be observed, Rule 107 provides a prompt and expeditious method available to the defendant to dispose of actions which are clearly improperly brought. For this reason only defenses which can normally be established by incontrovertible evidence or which raise questions of law which are

susceptible of prompt disposition, are included. It is thus possible for a defendant who holds in his possession a general release duly executed by the plaintiff, to make his motion under Rule 107 the very day he is served with the summons and complaint, and the action may thus be entirely disposed of in the short period of a week or ten days.

Furthermore, the rights of the plaintiff are entirely safeguarded by Rule 108 which provides that the plaintiff may oppose the motion by affidavits denying the facts alleged by the defendant or tending to obviate the objection raised by the defendant and the court may dispose of the motion in either of the following three ways: (1) by considering the affidavits and granting the motion, allowing the plaintiff, in the discretion of the court, the privilege of serving an amended complaint upon such terms as are just; or (2) the court may direct the questions of fact to be tried by a jury or referee, the findings to be reported to the court for further action; or (3) the court may overrule the objections and in its discretion allow the same facts to be alleged in the answer as a defense.

While there have been comparatively few decisions under Rule 107 since the Civil Practice Act and the Rules of Civil Practice took effect, there are instances where the courts have granted such motions (*Nissly & Sons v. Frank & Co.,* Supreme Court, New York County, Spec. Term, Part I, N. Y. L. J., Mar. 21, 1922).

The motions which I have discussed under Rules 106, 107 and 108 are also available with slight modifications to the plaintiff in connection with the answer, both with regard to defenses consisting of new matter and to counterclaims. The plaintiff's motion with respect to

the answer based upon defects appearing upon the face thereof must, however, be made within ten days after the service of the answer (Rule 109). This ten day rule is also applicable with respect to a motion for judgment dismissing the counterclaim based upon the pleadings and an affidavit where the defect does not appear on the face of the answer (Rule 110).

It is well to remember that although Rule 109, subdivision 6, permits the plaintiff to move to strike out the defense consisting of new matter on the ground that such defense is insufficient in law, this provision must be construed in connection with Section 242 which directs the defendant to plead affirmatively not only facts which heretofore were required to be affirmatively pleaded as a defense in confession and avoidance, but also any facts which, although heretofore admissible under a general denial, would be likely to take the opposite party by surprise, if not specially pleaded.

It is also a matter of some significance that although Rule 109 permits the plaintiff to make a motion to strike out a defense consisting of new matter as insufficient in law within ten days after the service of an answer, the plaintiff is not absolutely required to raise the point by motion at this early stage of the action. This is so because Section 279, which enumerates certain objections which are not waived unless taken by motion, specifically provides that the plaintiff does not waive the point "that a defense is insufficient in law upon the face thereof" by failure to raise the point before the trial.

Motions for summary judgments under Rules 113, 114.

In the judgment of many able practitioners the most useful and important new matter contained in the

Civil Practice Act and the Rules of Civil Practice is the new set of provisions contained in Rules 113 and 114 for the granting of a motion for summary judgment in certain cases. While I am not inclined to make as sweeping a statement as that, there is no question but that Rules 113 and 114 of the Rules of Civil Practice are of the utmost importance.

In the first place such a motion is made after the service of an answer and it can only be made in actions to recover debts or liquidated demands arising upon contract or upon a judgment for a stated sum. This includes actions on implied contract for the reasonable value of goods delivered or services rendered. The motion is made upon the pleadings and upon an affidavit of the plaintiff or any other person having knowledge of the facts "verifying the cause of action and stating the amount claimed, and his belief that there is no defense to the action." It is then incumbent upon the defendant to show by affidavit or other proof "such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend." Rule 114 merely applies these principles to a case where the plaintiff is entitled to a partial judgment on a part only of his claim as set forth in the complaint. This rule provides that such partial judgment be directed and that the remaining issues be severed and tried in the ordinary way in due course.

One is likely to be carried away upon the first reading of these rules and erroneously led to believe that such a remedy would lead to the entry of a summary judgment in all cases where the plaintiff could, by affidavit, make out a strong case for the recovery of such a debt or liquidated demand. Upon reflection, however, it is quite apparent that no such general in-

tent or purpose is to be found in Rule 113. The granting or denying of the motion is not so much based upon the strength of the showing made by the plaintiff, as it is upon the affidavits filed by the defendant in opposition to the motion. As stated in the rule, the motion must be denied if the defendant shall show such facts as may be deemed sufficient to entitle him to defend.

As was inevitable the courts were literally swamped with applications for summary judgment under these rules, almost immediately after October 1, 1921, and there have been more decisions with reference to these rules than any other phase of the new law. Furthermore, the scope and purpose of Rule 113 has been fully discussed in a very able opinion by Mr. Justice Page, in a case decided by the Appellate Division, First Department, in February, 1922 (*Dwan v. Massarene,* 199 App. Div. 872).

Before discussing this decision in detail, I should perhaps point out at least in a general way the difficulties which lay in the path of any provision which sought to make possible a summary judgment based merely upon the strength of the plaintiff's case. The problem is in no sense a new one and the difficulty involved is the constitutional guarantee of a jury trial in the ordinary action for a sum of money only.

The question arose many years ago in connection with a motion under Section 538 of the Code which provided that a sham answer might be stricken out upon motion. A sham pleading was well known at common law and was one which was in fact perjurious and false, although apparently valid on its face. In *Wayland v. Tysen,* 45 N. Y. 281, such a motion was made to strike out the defendant's answer which contained a general denial and the Court of Appeals then

held that such a motion could not be granted with respect to an answer containing denials. Here we have the real difficulty in connection with Rule 113. If the Court of Appeals in *Wayland v. Tysen* held that the general denial could not be stricken out as sham, the question now arises as to how the court may, pursuant to Rule 113, strike out a similar answer in peremptory fashion and grant a summary judgment.

The solution has happily been found by Mr. Justice Page and his associates in the Appellate Division, First Department, and this solution is that it was not held by the Court of Appeals in *Wayland v. Tysen,* or in any other case, that the defendant had a constitutional right to obstruct the processes of law by the imposition of a general denial, or in any other way. The constitution guarantees to a party the right to have issues of fact in certain cases tried by a jury, but the constitution does not, nor could it be expected to define when such issues of fact existed. The result is that it becomes incumbent upon the defendant, upon the making of a motion for summary judgment under Rule 113, to show that an issue in fact exists in the case. If the defendant is unable to produce facts sufficient to convince the court that there is an issue to be tried, then the motion must be granted. On the other hand, when a defendant by his own affidavit, or otherwise, shows that there is an issue of fact to be tried, then the motion must be denied and the plaintiff relegated to the ordinary legal procedure. As succinctly stated by Mr. Justice Page, at the end of the opinion in *Dwan v. Massarene:*

"The court is not authorized to try the issue, but is to determine whether there is an issue to be tried. If there is, it must be tried by a jury. Plaintiff's affidavit must state such facts as are necessary to establish a good cause of action. It will not be sufficient

if it verifies only a portion of the cause of action, leaving out some essential part thereof. It must state the amount claimed, and his belief that there is no defense to the action. The defendant must show that he has a bona fide defense to the action, one which he may be able to establish. It must be a plausible ground of defense, something fairly arguable and of a substantial character. This he must show by affidavits or other proof. He cannot shelter himself behind general or specific denials, or denials of knowledge or information sufficient to form a belief. He must show that his denial or his defense is not false and sham, but interposed in good faith and not for delay."

While a solution is thus afforded which will probably in time be sustained by the Court of Appeals, it is very much to be regretted that a more liberal view of the matter was not taken when the case of *Wayland v. Tysen* originally came before the Court of Appeals. It seems very plain that the theory that the defendant was only entitled to a jury trial where there is a real and not a fictitious issue to be tried, could just as well have been advanced originally by the Court of Appeals in support of a decision contrary to the one actually reached in *Wayland v. Tysen.* Certainly the language of Code Section 538 to the effect that "a sham answer or a sham defense may be stricken out" was susceptible of the construction now substantially applied by the Appellate Division in *Dwan v. Massarene.* There is nothing either in the Constitution or in the Code to warrant the conclusion that there is anything sacred about a general denial which should in itself, in all cases and under all circumstances, entitle the defendant to insist upon a jury trial.

The entire opinion in *Dwan v. Massarene* is worthy of very careful reading and consideration. Furthermore, there is one sentence at the very end of the opinion which is very puzzling. That sentence is "if he (the defendant) shall show such facts as may be deemed by the judge hearing the motion sufficient to

entitle him to defend, *this court will not review the order, as we consider that no substantial right of the plaintiff has been violated.*"

Here we find a distinct intimation that the decision of the judge at Special Term is to be deemed final on the question of whether the defendant has shown such facts as may indicate that there is or is not an issue to be tried. Why there should be applicable to this particular matter any different rule than that generally applicable in the case of motions is not apparent. Surely the Appellate Division has ample power to review judicial discretion and if such discretion will be reviewed in the case of motions for bills of particulars, motions for change of venue, motions to set aside the service of a summons upon conflicting evidence, and so on, it would seem not only proper, but eminently desirable that the Appellate Division should also review and pass upon the discretion exercised by the judge at Special Term in determining whether or not the defendant in opposing the motion for summary judgment has shown sufficient facts to entitle him to defend. It is true that Rule 113 is somewhat curiously worded in this respect in that it provides:

> "Unless the defendant by affidavit, or other proof, shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend."

It would seem, however, that this was not intended to in any sense deprive the Appellate Division of its power to review the action of the judge at Special Term in this particular.

It is worthy of notice that Rules 113 and 114 have been derived from the English Rules of Practice and for this reason the English decisions are discussed at some length in *Dwan v. Massarene,* and also in the

decision by Mr. Justice Kapper, at Special Term, Part I, of the Supreme Court, Kings County, in *Twigg v. Twigg* (N. Y. L. J., Dec. 1, 1921).

Before proceeding to some of the other points in connection with Rule 113, it may be well to consider a few illustrative cases. Let us suppose A, the payee of a promissory note sues B, the maker and that the defendant serves an answer containing a general denial. A moves for summary judgment under Rule 113 and in opposition to the motion B files an affidavit in support of his general denial, in which he states that he delivered the promissory note to A upon the express understanding that it was only to be paid in the event that he, B, sold a certain house, and that the house had not been sold. The plaintiff in the replying affidavit denies that any such oral agreement was had and he annexes to the replying affidavit certain correspondence of the defendant tending to indicate that the note had been unconditionally delivered. In this case the defendant has shown facts to indicate that there is an issue to be tried and the motion for summary judgment must be denied.

Let us next take a case where X sues on a promissory note made by A payable to the order of B, which it is alleged in the complaint was transferred to X who claims that he is the holder thereof in due course. The answer of the defendant denies for lack of any knowledge or information thereof sufficient to form a belief the allegation that the plaintiff is a holder in due course and sets up an oral agreement between the defendant and the payee of the note to the effect that payment was only to be made conditionally upon a certain event which had not yet taken place. In this case, the defendant has really not produced any evi-

dence whatever tending to convince the court that there is an issue to be tried, and the motion for summary judgment should be granted (*General Investment Co. v. Interboro Rapid Transit Co.*, decided by the Appellate Division, First Department, in March, 1922, — App. Div. —, N. Y. L. J., May 5, 1922; *Hays v. National Surety Co.*, Spec. Term, Part I, City Court of N. Y. City, Schmuck, J., N. Y. L. J., May 23, 1922; see *contra, Rogan v. Consolidated Copper Mines Co.*, Sup. Court, N. Y. County, Spec. Term, Part III, Lehman, J., 117 Misc. 718).

There is a very excellent discussion of the general right to grant summary judgment for the plaintiff in an action where the defendant has merely denied for lack of any knowledge or information sufficient to form a belief the assignment to the plaintiff of the promissory note sued upon, in *Hanna v. Mitchell*, where Mr. Justice Mullan at Special Term, Part I, of the Supreme Court, New York County, somewhat reluctantly granted a motion for summary judgment on a similar state of facts (N. Y. L. J., March 3, 1922). The arguments for both sides are summed up as follows by Mr. Justice Mullan:

"The argument for the plaintiff could be this: The defendant is only seeking delay. I now show him the proofs that make out my prima facie case. Does he controvert or seek to impeach them? No. He cannot. He says, merely that he wants me to show them to a jury of twelve men. But what can be gained by that, except delay for the defendant? At a trial the acknowledged and authenticated assignment would be offered in evidence. The case would then be with the defendant. What could he do? If there is anything he thinks he could do let him tell us now. If there is anything that he even tells us he could do, I admit we must await a hearing before a jury. But if he cannot tell us anything—and presumably he cannot, as he does not—it is to be assumed that he is trying to put off the day of reckoning and nothing more. The purpose of the framers of Rule 113 was to prevent that very thing, the prevalence of that species of practice having brought reproach

upon the law. The answer of the defendant could be this: I take the law as I find it. In denying that I knew whether the note was assigned to the plaintiff I acted within the rules of pleading laid down in the statute. I acted honestly. I did not know, and it is not even contended that I knew, when I pleaded, that the assignment to plaintiff had been made. The Legislature, I may even go so far as to concede, could have authorized the making of the Civil Practice Rules that would have the effect of changing the legislative rules, but it did not. It merely authorized the making of rules to amplify and provide working mechanics for the application of its own rules. The legislative rule is that an honest issue of fact, created under its own rules of pleading, shall last until disposed of upon a trial. If an issue be tendered dishonestly, and it be shown that the dishonesty existed when the issue was tendered, the pleading matter raising that issue may, in a proper case, be struck out as sham. But there can be no room for a suggestion here that the issue I raised was, when tendered, not tendered honestly, and so, of course, the rule as to sham issues has no applicability. It would be competent for the Legislature (as a pleading matter) so to enact as to permit the claim of sham pleading to be made in respect of a pleading not originally sham but that would become treatable as sham if adhered to or relied upon after the pleader had been notified by his adversary of facts which, had they been in the pleader's knowledge when he verified his pleading, would have made it impossible honestly to plead as he did. The Legislature, however, did no such thing. Furthermore, if it be assumed, without so admitting, that it can be said to have been the intent of the Legislature to delegate to the makers of the Civil Practice Rules the very power plaintiff seems to claim that they were given, and that they exercised, I contend that my constitutional right to a jury trial cannot be so destroyed. It is true that I may not be able to say now what I will do at the trial to disprove the assignment of the note. Perhaps I might be able to show that the acknowledgment on the assignment was not taken by one qualified, or I might call the assignor and the assignee and show by one or both that the assignment was not in fact made. I should not be asked now, in a war of affidavits, to say what precise step I could or might take. Every step and every gesture, no matter what, should be in the presence of a jury. You are seeking to whittle down my defense, by successive cuts, before we reach the proper triers of the facts. The jury system may have its disadvantages, and admittedly cause delays, but we have the system and must abide by it. The plaintiff may then reply in the following vein: I do indeed contend that the Legislature intended to delegate to the makers of the Practice Rules the power to compel a defendant to abandon a plea honestly made in the first instance when he is confronted with proof that makes it dishonest thereafter to assert that the defendant has not sufficient knowledge or information. The phantom rights of earlier

days are giving way before the cry for realities that is the natural demand of a more pragmatic age. The real question here is, Is there any real issue of fact—that is, any substantial issue? You have shown there is none. Your prattle about the Constitution is futile nonsense that should not deceive courts of justice. The last word from the defendant might be: Although you are not ingenuous enough to say so in so many words, your argument on the constitutionality point seems to be, in its last analysis, that a big issue in a law action, or what you call a 'substantial' issue must go before a jury, but that a little issue may be disposed of out of hand by a judge. I claim that no distinction can be drawn between a big and a little issue. Certainly the law does not furnish any yardstick by which to measure issues. Your argument reminds one of the famous excuse of Clara Pegotty for her illegitimate offspring—that it was such a very little baby. Every issue of fact in a law action must go before a jury, and the question whether plaintiff has title to the note sued on raises an issue."

An interesting situation also appeared in the case of *Hoxsie v. Berri* (N. Y. L. J., March 14, 1922). In this case the plaintiff, who was a physician, sued upon an account stated based upon a bill for professional services which originally amounted to $2,035. The defendant had paid $1,000 and a further payment of $35, and when the check in the amount of $1,000 was sent the defendant had written a letter in which he stated "here is one-half your bill for William Herbert Berri's sickness. I will send the rest as soon as I am able to get the money." After the filing of an answer the plaintiff moved for a summary judgment at Special Term, Part I, of the Supreme Court, Kings County. The matter came up for argument before Mr. Justice Callaghan, who granted the motion on the ground that the only alleged defense set up in the defendant's answering affidavits was that the professional services rendered by the plaintiff were not worth the amount which he charged therefor. The court further pointed out that such facts did not constitute a defense to an action on an account stated which could only be attacked for fraud or mistake.

There have been a large number of cases where the motion for summary judgment has been denied on the ground that the court found sufficient evidence in the defendant's affidavits to indicate that there was an issue to be tried; in a few cases the motion has been denied without prejudice to its renewal on proper affidavits (*Kohn v. Thomas,* Sup. Court, N. Y. County, Spec. Term, Part IV, Lehman, J., N. Y. L. J., Jan. 19, 1922); and in many cases a motion for partial judgment under Rule 114 has been granted (*Western Electric Co., Inc. v. Zimmet,* Sup. Court, N. Y. County, Special Term, Part V, Lydon, J., N. Y. L. J., May 1, 1922; *Cohen v. Richman,* Sup. Court, N. Y. County, Spec. Term, Part IV, Lehman, J., N. Y. L. J., Jan. 25, 1922; *Dodds v. Lamar,* Sup. Court, N. Y. County, Spec. Term, Part VI, Donnelly, J., N. Y. L. J., Feb. 24, 1922; see also *Appelbaum v. Gross,* Sup. Court, Kings County, Spec. Term, Part I, Kapper, J., N. Y. L. J., Dec. 3, 1921).

There is one instance where the motion for summary judgment under Rule 113 was granted "with leave, however, to the defendant to serve an amended answer within ten days upon payment of $10.00 costs" (*Cohen, Goldman & Co., Inc. v. Ellmann,* Sup. Court, N. Y. County, Spec. Term, Part V, Lydon, J., N. Y. L. J., Apr. 29, 1922).

An additional point of some importance is that there is no limitation of time within which a motion for summary judgment under Rule 113 must be made; and it has accordingly been held that the motion may be made at any time before trial (*American Woodpulp Corporation v. Miami Paper Co.,* Sup. Court, N. Y. County, Spec. Term, Part IV, Mullan, J., N. Y. L. J., Apr. 6, 1922).

No doubt in the vast majority of cases the defendant will be able by some hook or crook to present evidence sufficient to convince the court that there is an issue to be tried. On the other hand, it would seem to be well worth while for the plaintiff in almost every action to recover a debt or liquidated demand on contract or upon a judgment, to make such a motion upon the chance that the defendant may not be able to convince the court that there is an issue to be tried or at least with a view toward obtaining considerable details with reference to the defendant's defenses, which would doubtless be of great value for the purpose of cross-examination at the trial and general preparation for trial.

There is another point which I desire to discuss with respect to motions for summary judgment, and that is a question of considerable doubt and difficulty. In a recent case (*Chelsea Exchange Bank v. Munoz,* 118 Misc. 159), the plaintiff made a motion to strike out a counterclaim contained in the answer and for summary judgment under Rule 113. The question thus presented was as to whether Rule 113 was confined purely to defenses and whether it was intended to thereby permit a plaintiff to attack a counterclaim. Mr. Justice Cohalan decided that the motion must be denied, and in the course of his opinion, he said:

"The question is novel and, in so far as I am able to ascertain, has not been passed upon since our practice rules went into effect. A reading of rule 113 shows, I believe, that this rule was made for the purpose of doing away with defenses that have no merit, defenses that are put in purely for the purpose of delay. I do not believe the rule is open to the construction put upon it by the plaintiff, that counterclaims may be attacked as well as defenses. I do not believe the makers of the rule ever intended it to so apply. If there was such an intent it is not apparent either by inference or otherwise from the wording of the rule. The rule in so far as defenses are concerned is an excellent one, though at

times, as I have had occasion in a late decision to remark, it is open to abuse. My belief that this rule is not applicable to counterclaims as alleged in the present case is strengthened by a consideration of rules 109, 110 and 112. Rule 113 is what, for a better term, we might call a plaintiff's remedy. It is certainly not a defendant's remedy. A counterclaim is in the nature of a new action where the defendant becomes the plaintiff and the plaintiff becomes the defendant, and so the plaintiff in the complaint may not as a defendant in the counterclaim ask a plaintiff's relief such as is contemplated in rule 113."

The question thus decided by Mr. Justice Cohalan is one of very considerable difficulty as there is nothing in the language of Rule 113 to restrict the motion to cases where an answer does not contain a counterclaim and the decision as made would appear to make it possible for a defendant to successfully avoid any motion for summary judgment by merely interposing a counterclaim which might in itself have no foundation whatever in fact. On the whole, however, the decision as made appears to be more in accord with the general intent evidenced by the language of Rule 113, although the situation could be considerably clarified by appropriate amendment to the rules. (See also as to counterclaims *Neuowich v. Ironbound Realty Corp'n,* Sup. Court, N. Y. County, Spec. Term, Part I, Lehman, J., N. Y. L. J., March 28, 1922.)

While there can be no doubt that the relief afforded by means of motions for summary judgment under Rules 113 and 114 is a very excellent thing, the unusual number of such motions now pending before the courts and the great diversity of points sought to be raised thereby give rise to some doubt as to whether in their zeal to interpret these rules liberally the courts are not perhaps going rather far in the other direction. Thus motions for summary judgment have been made to test the sufficiency of denials for lack of knowledge

or information sufficient to form a belief, which, because relating to matters of public record, the defendant claimed were unauthorized and void (*Murphy v. Globe Indemnity Co.,* City Court of New York City, Special Term, Part I, Schmuck, J., N. Y. L. J., May 18, 1922); and even to test the sufficiency of an answer which was obviously open to a motion to make it more definite and certain because the denials were so intermingled with admissions as to leave it doubtful what fact was denied (*Nemours-Stevens, Lim. v. Nemours Trading Corp'n,* Supreme Court, New York County, Special Term, Part VI, Donnelly, J., N. Y. L. J., May 16, 1922). Such motions have also been made for the purpose of construing contracts and policies of insurance (*Brooklyn Clothing Corp'n v. People's Nat. Fire Ins. Co.,* Supreme Court, Kings County, Special Term, Part I, Fawcett, J., N. Y. L. J., May 22, 1922), and generally to obtain a decision on various points of law which appear to be more or less decisive of the case (*McBride v. Hodgens,* Supreme Court, New York County, Special Term, Part VI, Newburger, J., N. Y. L. J., May 24, 1922).

Finally, a word as to the preparation of the plaintiff's motion papers when making a motion for summary judgment. A number of such motions have been denied because of the insufficiency of the motion papers, which should be so prepared as to make it clear that the plaintiff or other person making the affidavit in support of the motion has knowledge of the facts, and that he verifies the entire cause of action and not merely a part thereof (*Stott v. C. B. Drake & Co., Inc.,* City Court of New York City, Special Term, Part I. Schmuck, J., N. Y. L. J., May 25, 1922).

Motion for judgment under Section 476.

There is another new section which was recommended by the Special Committee of the New York County Lawyers Association and which is as follows:

"Sec. 476. Judgment on pleadings or admission of part of cause. Judgment may be rendered by the court in favor of any party or parties, and against any party or parties, at any stage of an action or appeal, if warranted by the pleadings or the admissions of a party or parties; and a judgment may be rendered by the court as to a part of a cause of action and the action proceed as to the remaining issues, as justice may require."

I shall discuss only one point in connection with this section, but that is a point of very substantial importance. As the section provides that judgment may be rendered if warranted "by the pleadings" or "the admissions of a party or parties," is the motion based entirely upon the pleadings or may it be founded upon proof by affidavit of admissions by the parties otherwise made?

In view of the specific provisions of Rule 112 with reference to motions for judgment on the pleadings after issue joined, and in view of the language of Section 476 which places in the *disjunctive,* pleadings on the one hand and admissions on the other, it would be my judgment that it was intended to permit a motion for judgment under Section 476 to be founded upon admissions not necessarily contained in the pleadings. The section is not entirely clear on this point, but I should suppose that it was susceptible to the interpretation which I have suggested.

The only decision I have been able to find on this point is one by Mr. Justice Burr at Spec. Term, Part I, of the Sup. Court, N. Y. County (N. Y. L. J., Jan. 26, 1922), in *Orvigs Dampskibsselskab Aktieselskab, a*

Norwegian corporation, v. Jewett, Bigelow & Brooks, Inc., where, at the time of the making of the motion under Section 476, one set of pleadings existed which were supplanted before the argument of the motion by the service of an amended answer. Mr. Justice Burr held that the motion should be disposed of upon the state of the pleadings at the time of the argument and he held "the admissions in the original answer may be used as evidence at the trial, but they are not admissions for the purposes of this motion."

Motions generally.

With respect to motions generally, the provisions of the Code have been retained almost in their entirety, although considerable matter formerly included in the statute itself now appears in the Rules of Civil Practice under Title 10 with respect to motions.

There are two changes, however, which require very careful consideration. The first is the total omission from the present Rules of Civil Practice of Rule XXIII of the old General Rules of Practice which required an affidavit of merits as part of the motion papers wherever the motion was addressed to the discretion of the court and where the relief requested was not such that the party was entitled thereto as a matter of right. The provision of old General Rule of Practice XXIV requiring an affidavit of merits in connection with an application for extension of time to answer or reply has been retained and is now Rule 88 of the Rules of Civil Practice. The general provision formerly contained in General Rule of Practice XXIII has been entirely omitted. What is the meaning of this omission? Does it mean that an affidavit of merits is no longer required except in cases of applications for

extensions of time to answer or reply? I apprehend not. It seems to me that the effect of the repeal or omission of old General Rule of Practice XXIII is merely to eliminate the unnecessary requirement of an affidavit of merits in connction with every motion addressed to the discretion of the court. Thus where a motion is made for a bill of particulars, which has always been deemed to be a motion addressed to the discretion of the court, there would appear to be no real necessity for an affidavit of merits and it has been so held under the Civil Practice Act and the Rules of Civil Practice (*Benediktsson v. Weston Dodson & Co., Inc.*, Sup. Court, N. Y. County, Spec. Term, Part I, Giegerich, J., N. Y. L. J., Jan. 24, 1922).

On the other hand there are a great many motions which are of such a nature as to plainly require the showing of merits in order to warrant the court in granting the relief requested, such as motions to open defaults. The result is that the matter of requiring the showing of merits either by a technical affidavit of merits or otherwise is now placed upon the basis of common sense and not as heretofore upon the basis of an absolute and unvarying requirement of law.

The other change to which I have referred relates to the form of an order to show cause. Rule 60 now provides that an order to show cause shall contain a direction as to "when and *how* the same shall be served." Formerly it was the practice for the court or judge to provide in an order to show cause as to when it was to be served, but there was considerable doubt as to whether the court or judge had any authority to prescribe the method of service. The point is of some importance as many occasions arise upon which it would be desirable, if not absolutely essential, that a

provision be made for the service of a copy of the order to show cause and the annexed affidavits by mail.

Consolidation and Severance.

There are two very short and simple sections with reference to consolidation and severance which should prove to be very effective. They are as follows:

"Sec. 96. Consolidation and severance of actions.
An action may be severed and actions may be consolidated whenever it can be done without prejudice to a substantial right."

"Sec. 97. Consolidation of actions pending in different courts.
Where one of the actions is pending in the supreme court and another is pending in another court, the supreme court, by order, may remove to itself the action in the other court and consolidate it with that in the supreme court."

The effect of these sections is more fully realized by comparing them with Section 817 of the Code which permitted the consolidation of causes pending in the same court "in favor of the same plaintiff against the same defendant." By omitting the words just quoted the Legislature clearly intended to grant to the courts the power to consolidate or sever actions irrespective of parties and other circumstances where a consolidation or severance can be done without prejudice to a substantial right (*Savage Realty Co., Inc. v. Lust,* Sup. Court, N. Y. County Spec. Term, Part I, Bijur, J., N. Y. L. J., Feb. 21, 1922).

Viewed as a general proposition, Sections 96 and 97 merely form a logical, if not entirely necessary, portion of the new system of the Civil Practice Act with reference to the joinder of parties, defects of parties and the joinder of causes of action. The problem presented, however, when viewed in the light of specific instances, is one of very considerable difficulty.

One phase of this problem has already given rise to

a sharp difference of opinion among the justices sitting at Special Term. I refer to the situation where one action is pending in the Supreme Court and another action pending in the Municipal Court of New York City or the City Court of New York City or one of the lower courts in some other portion of the State. Although the facts of the two cases are such as to make it quite convenient to try them together, the situation is almost certain to arise which makes it possible to try the lower court case many months or perhaps years sooner than the Supreme Court case. This is particularly true in New York County, where the Supreme Court Calendars are so far behind and where a trial in the Municipal Court or in the City Court can be had in a much shorter period of time.

In *Weiss v. Asmenit,* Mr. Justice Mullan, sitting at Special Term, in the Supreme Court, Bronx County (N. Y. L. J., Feb. 4, 1922), held that the case was a proper one for consolidation and that the mere circumstance that the plaintiff in the Municipal Court action would be subjected to delay, was not a sufficient reason for denying the motion for consolidation. A similar decision was made by Mr. Justice Delehanty at Special Term, Part I, of the Supreme Court, N. Y. County in *Walkoff v. Chasanoff* (N. Y. L. J., May 2, 1922), where one of the causes was pending in the City Court of New York City.

A contrary decision, however, was made by Mr. Justice Dike, at Special Term, Part I, of the Supreme Court, Kings County, in *Brody v. Madison Lunch, Inc.* (N. Y. L. J., Dec. 16, 1921), on the ground that the right to have the case inexpensively and speedily tried in the Municipal Court was a substantial right, of which the plaintiff in the Municipal Court could not be lawfully deprived.

I shall make no attempt to reconcile these decisions, although I believe the matter is one which should not be disposed of as a general proposition, but rather is one to be decided on the facts of each particular case as it arises. Surely there is no absolute right to a trial of any issue at any particular time and it would seem erroneous to dispose of the question as a matter of law merely because of the delay which would be necessarily involved. If such a restricted interpretation were to be adopted, it would result in greatly diminishing the powers of the courts not only under Sections 96 and 97 of the Civil Practice Act, but also under Section 105 which relates generally to mistakes, defects and irregularities.

There is, however, a further question with reference to consolidation and severance which seems to be an even more serious obstacle to consolidation in many cases. Suppose the two actions which are sought to be consolidated involve certain jury questions which it would be very convenient to try together and where the general situation is such as to make a consolidation of the actions desirable, but in one of the actions there is a prayer for equitable relief based upon a proper state of facts set forth by way of counterclaim or otherwise. Here is a difficulty which I am afraid the courts could not successfully surmount.

This problem is subject to considerable variation and is applicable to any situation which may arise where one action involves issues of fact which the parties are entitled to have tried by a jury and the other case or cases involve issues which would customarily be tried at an equity term of the court. When one considers the matter, there is no really fundamental reason why the circumstance that some issues

must be tried by a jury and other issues by the court alone, should prove to be an insuperable obstacle. On the other hand, in spite of the legislative declaration to the effect that all forms of action have been abolished and specifically abolishing the distinction between actions at law and suits in equity (Civil Practice Act, Sec. 8), we all know that the distinction still in fact exists. The arrangement of our calendars, the division into Trial Terms and Special Terms, and the general convenience involved in applying certain rules to actions at law and other rules to suits in equity, have built up a rather substantial obstacle in the path of complete simplification.

The great benefits to be derived from the liberal construction of Sections 96 and 97 with respect to consolidation in the matter of reducing the already crowded calendars and making the administration of justice more complete and more expeditious in every way, makes it desirable that some means be found to properly consolidate actions at law and suits in equity where the issues may be conveniently tried, and if the courts do not find that sufficient power has been given to them by the present provisions of the Civil Practice Act, the Act should be so amended as to unquestionably give the necessary authority.

LECTURE V.

Depositions.

The law with respect to the examination of witnesses and parties before trial and the taking of depositions generally has been very radically changed, and what may be fairly characterized as an entirely new system of practice has been adopted on this matter.

It will be recalled that the Code provided one system of rules which was applicable to the taking of testimony before trial within the state for use within the state, and an entirely distinct system applicable to the taking of testimony out of the state for use within the state. Furthermore, there was a sharp distinction between the examination of a party before trial and the examination of a witness other than a party before trial. In taking the testimony of a witness other than a party before trial, the deposition was commonly called a deposition *de bene esse.* The present system under the Civil Practice Act is practically uniform with respect to each of these three classes of depositions, although there are great differences in detail, which I shall presently discuss.

The basic section on depositions is Section 288, which provides for the taking of the testimony of: (a) the party himself; (b) an adverse party; (c) the original owner of a transferred claim; (d) a person about to depart from the state; (e) a person without the state; (f) a person residing over 100 miles from the place of trial; (g) a sick or infirm person; (h) any person where special circumstances render it proper that his deposition should be taken.

Three of these instances are entirely new, namely; the taking of the testimony of the original owner of a transferred claim, the taking of the testimony of a person who resides more than 100 miles from the place of trial, and the omnibus provision at the end making it possible to take the testimony of any person where some special circumstances exist which render it proper that his testimony be taken.

It is well to bear in mind in considering the whole subject of depositions that Section 288 is the basic and fundamental section which limits the power of the courts in respect to depositions generally.

Corporations are, of course, classified as persons, but there is a special section (Section 289) covering corporations which provides not merely for taking the testimony of officers, directors and managing agents of a corporation, joint stock association or other unincorporated association, but which also provides for the taking of the testimony of "employes" of said corporations (See *Sloane v. Hill,* Supreme Court, N. Y. County, Spec. Term, Part I, Burr, J., N. Y. L. J., Dec. 20, 1921). This is a change in the law which should be of great practical benefit. Let me take as an illustration a case about which I was consulted only a few days ago. Many of you are no doubt acquainted with the flight of stairs leading from the north end of the subway station at Grand Central up to the corridor leading to the trains. This flight of stairs is almost perpendicular. Only a short time ago a man was just starting to come down this flight of steps when he lost his balance or tripped and fell striking his head against the cement flooring with the effect of almost instantaneous death. It happened that the place was entirely deserted at the time except for the ticket chopper

who was stationed at the foot of the stairway. You may well imagine the natural reluctance on the part of this employe of the Interborough Rapid Transit Company to make any statement with respect to the accident. Here was a new remedy, however, provided by the Civil Practice Act, which made it possible to compel this employe of the Interborough Rapid Transit Company to give his testimony under oath concerning whatever he knew about the occurrence.

I take it that if properly used this opportunity to examine employes of corporations will become in time fully as useful as the customary examination of a party before trial. Certainly there are a great many personal injury cases where the facts are known to employes of the corporation whose liability is sought to be established, and where these employes being afraid to lose their positions or subject themselves indirectly to some penalty or other are literally afraid to make any statement of the facts to any one other than an investigator employed by the company. The method here provided gives ample protection to the employe and makes it possible for the injured person to get a true statement under oath of the circumstances just as readily as may the corporation itself.

We must not, however, get the impression that the old rules about examinations before trial have been entirely swept away because one of the most restrictive of these rules has been preserved intact. I refer to the rule that a party could only take the testimony before trial where he could show that it was material and necessary for him to use this testimony *in support of his own affirmative case.* In other words, if certain issues were presented by allegations in the complaint which were denied in the answer, the plaintiff could

examine the defendant on the issues thus presented because the plaintiff was taking the testimony in support of his own affirmative case. A similar right did not exist in behalf of the defendant who was not allowed to examine the plaintiff in support of the defendant's denials. Where, however, the defendant's answer contained affirmative defenses as well as denials, it was possible for the defendant to examine the plaintiff before trial in support of the affirmative matter contained in the answer, but not in support of the denials. I have always felt that this discrimination between the parties was wholly unnecessary and that examinations before trial should be allowed with the greatest liberality, as in Canada for instance. The Civil Practice Act preserves the rule of the Code in this respect, and it is as true today as it was prior to October 1, 1921, that testimony can only be taken before trial in support of one's affirmative case. This conclusion is required by the statement contained in Section 288, that testimony may be taken "which is material and necessary in the prosecution or defense of the action," and this language is repeated several times in various other sections relating to depositions and in the various rules covering the same subject. That this rule of the Code has been preserved has already been held in a number of decisions (*Levy v. Nemours Trading Corporation,* Supreme Court, New York County, Special Term, Part I, Wagner, J., N. Y. L. J., Dec. 19, 1921; *Rudd v. Heckscher,* Supreme Court, Kings County, Special Term, Part I, Dike, J., N. Y. L. J., Apr. 19, 1922.)

An entirely new method has been devised for the taking of testimony before trial, and the customary procedure under the Civil Practice Act is to merely

serve a notice instead of going to the trouble of obtaining an order for examination before trial as was done under the Code. This notice is provided for in Section 290, which is to be read in connection with Rule 121. It thus appears that the notice is to be served upon the *attorney* for the other side, and that it must contain a statement of the person before whom the testimony is to be taken; the time and place at which it is to be taken; the name of the person to be examined; and the issues upon which such person is to be examined. While Section 290 provides that reasonable notice is to be given, Rule 121 specifically requires the notice to be served not less than five days before the return day. The rule under the Code was that an order for examination before trial must be served not more than twenty days nor less than five days before the return day; but there appears to be no maximum limit under the Civil Practice Act or Rules to the time within which the notice may be served, so that the notice might be served even a month or six weeks before the time fixed for the taking of the testimony.

As to the person before whom the testimony is to be taken, Section 301 provides that it may be taken "before any judicial officer, notary public, or attorney and counsellor-at-law." This, of course, does not include a commissioner of deeds (*Kahn v. Rich,* Bronx County Court, Gibbs, J., N. Y. L. J., May 9, 1922).

While in the country districts lawyers will no doubt take full advantage of the provisions of Section 301, it would not seem to me to be proper practice to have the notice returnable before a notary public or a lawyer occupying the same suite of offices with the attorney subscribing the notice. Not that the proceedings would thereby be absolutely nullified, but the opportunity

would thus be presented to the other side to claim some sort of over-reaching or irregularity. In the city districts it will probably be found desirable to have the notice returnable at the term of court for the hearing of *ex parte* business, where convenient machinery is available for the swearing of the witnesses and the taking of the testimony. In those instances where I have examined persons before trial since October 1, 1921, I have uniformly made the New York County notices returnable at Special Term, Part II, of the Supreme Court, New York County. Furthermore, there is something about being duly sworn by a clerk of the court at the court house which has a salutary effect upon the average layman, who is likely to be much more careful in his testimony under such circumstances than if he merely appeared before some lawyer or notary public.

As to the issues upon which the person is to be examined there seems to be some question. Under the Code, you will recall, there was the general provision that the order might in the discretion of the judge, designate and limit the particular matters as to which parties could be examined (Code, Section 873). The plain and simple interpretation of this section was that the order might provide in general terms that the person be examined with respect to the issues in the case, or if the court in its discretion thought proper the order might more specifically refer to certain particular issues. The courts, however, particularly the Appellate Division of the First Department, held that the order in general terms was improper and required every order for examination before trial to specify with particularity and precision the exact issues with respect to which person was to be examined. What

then is the situation under Section 290 which merely provides that the notice must state in writing "the issues upon which such person or persons are to be examined"?

In view of the fact that the Civil Practice Act is supposed to liberalize the practice and in view of the unequivocal statements by the Appellate Divisions of the First, Second and Fourth Departments, to which reference was made in the first lecture of this course, I do not see any really fundamental objection to a notice which merely provides in general terms that the testimony is to be taken with reference to the issues in the case. The only decisions there have been on the subject up to this time are, however, unfortunately the other way. Thus in *Kleinberg v. Fireman's Fund Insurance Co.*, Mr. Justice Wendel sitting at Special Term, Part I, of the New York City Court (N. Y. L. J., Jan. 11, 1922), held that a notice requesting an examination as to "the matters contained in the Fifth, Sixth and Seventh Paragraphs of the complaint and which are denied by defendant's answer" was too general to properly define the scope of an examination, and a motion to vacate the notice was granted (See also *Leslie v. Peggy Hoyt, Inc.*, City Court of N. Y. City, Spec. Term, Part I, Schmuck, J., N. Y. L. J., May 16, 1922; *Newman v. Potter*, App. Div., First Dept., N. Y. L. J., June 3, 1922).

The rights of the witness or party are fully safeguarded by the provision contained in Section 300, that he may be required to attend only in the county where he resides or where he has an office for the regular transaction of business in person.

Let us now briefly consider the question of how pressure may be brought to bear upon a delinquent person

who refuses to appear and be examined. The normal procedure under the Code was to start contempt proceedings on the ground that the person directed to be examined had disobeyed the mandate of the court, and as a foundation for such proceedings the default of the person in appearing to give his testimony was customarily noted on the original order by the clerk of the court.

The system adopted by the Civil Practice Act is entirely different. The notice, as already stated, is to be served upon the attorney. It is not necessary nor is it particularly desirable in most cases that a copy of the notice be served upon the person who is to appear and give testimony. The witness whether he be a party or an ordinary witness is to be served with a *subpoena* as provided in Section 299, and upon his failure to obey the subpoena it is contemplated that he shall be punished for his contempt of court just in the same manner as any other witness who disobeys a subpoena lawfully issued and served (*Lerner v. Helman,* Supreme Court, N. Y. County, Special Term, Part I, Tierney, J., N. Y. L. J., May 12, 1922).

It has been suggested that to require the notice to be served upon the attorney and in addition to require the service of a subpoena upon the party whose testimony is to be taken is more trouble than the procedure under the Code; and some members of the bar have intimated that it would be a proper thing to merely serve the notice on the attorney and then if the party failed to appear, make a motion to strike out his pleading. In the first place I can see nothing complicated or difficult about supplementing the service of the notice with the service of the subpoena. Furthermore, I feel quite confident that the normal, ordinary course

of procedure under this article of the Civil Practice Act is to follow up the disobedience of the subpoena with contempt proceedings. Accordingly I should say that in the average case the court would without hesitation deny a motion to strike out the pleading of a party merely because he had failed either to obey the notice for his examination served upon his attorney, or a subpoena served upon the party himself.

With respect to the general proposition of the power of the courts to strike out the pleading of a party who has been guilty of some contumacious or other improper conduct there is no question (*Wolfe v. Union, etc., Paper Co.*, 148 App. Div. 623; *Campbell v. Bauland Co.*, 41 App. Div. 474); but the point I wish to make is that I do not believe the courts should resort to this unusual remedy simply because the attorney seeking to have the court impose such a harsh penalty has not taken the trouble to serve a notice and a subpoena as well, or where, having served both the notice and subpoena, such attorney thinks it easier to proceed by motion to strike out the pleading of the delinquent party than to go ahead with the ordinary contempt proceedings.

This matter does not seem to have been very fully considered by the courts as yet, but there are one or two intimations. In *Gabriel v. Great Atlantic & Pacific Tea Co.* (N. Y. L. J., May 25, 1922), a notice had been served directing the officers of the defendant and one of its employees to appear for examination. As the notice was not obeyed a motion was made to strike out the answer of the defendant. This motion came on for argument before Mr. Justice Schmuck at Special Term, Part I, of the City Court of New York City. It did not appear in the brief opinion of the court whether sub-

poenas had been served upon the officers of the defendant and upon its employee. The motion to strike out the defendant's answer was granted upon the authority of Section 405 of the Civil Practice Act, which provides generally the penalty for disobedience of a subpoena or order and which contains the following sentence at the end thereof "If he is a party to the action in which he was subpoenaed, the court, as an additional punishment, may strike out his pleading." In spite of this provision of Section 405, which I may say provides for striking out the pleading only "as an *additional* punishment," it would seem to be the proper practice to punish a delinquent party or witness primarily by contempt proceedings; and only in the event that for some reason or other, such as the impossibility of serving personally upon the delinquent party the order to show cause in the contempt proceedings, is it proper to move to strike out a pleading of the delinquent party.

There is another reference to this matter of striking out the pleading of a party in *Siegfried Lowenthal, Inc. v. Sullivan* (N. Y. L. J., February 25, 1922). In that case Mr. Justice Ford sitting at Special Term, Part I, of the Supreme Court, New York County, said by way of *dictum* that he had no doubt that the court had the right and power to compel compliance by a party with any reasonable and legal requirement by striking out the pleading of the party. He denied the motion to strike out the amended answer of the defendant in the case before him, however, because it appeared that no notice or subpoena had been personally served upon the defendant.

Further light is shed upon this subject by a very interesting letter which was published in the New York Law Journal on January 16, 1922, from Mr. John

Godfrey Saxe, the chairman of the Special Committee of the New York City Bar Association, appointed to consider the provisions of the Civil Practice Act. In the course of this letter Mr. Saxe points out that the present practice of taking depositions before trial is based upon Section 863 of the United States Revised Statutes, and he mentions the fact that it was contemplated that a person who might disobey the subpoena would be subject to contempt proceedings as the normal means of compelling obedience of the subpoena.

This brings me to the consideration of the method to be pursued in connection with the examination before trial of a non-resident party, as to which the provisions of the Civil Practice Act do not seem to be entirely clear.

This point was recently discussed by Mr. Justice Whitaker in *Bassel v. Selis,* at Spec. Term, Part I, of the Supreme Court, New York County (N. Y. L. J., Jan. 17, 1922). In that case the defendant was a non-resident of the State of New York and the plaintiff duly served a notice upon the attorney for the defendant stating that he desired to take the testimony of the defendant at a certain time and place with reference to certain specified issues. A motion was made to vacate the notice as not authorized by the Civil Practice Act.

The first point relates to the question as to whether there is authority under Section 288 to take the testimony of an adverse party who is without the state; and upon examining that section carefully, it will be observed that the first sentence relates generally to taking the testimony of parties and contains no reference whatsoever to the residence of the parties, whereas the last sentence of the section, which relates to the

taking of the testimony of persons other than parties, expressly includes as a ground for the taking of the testimony that such person "is without the state." Section 300 on the other hand expressly provides that where the person to be examined is not a resident of the state "he shall not be required to attend in any other county than that where he is served with a subpoena, except that where the examination is held pursuant to an order, he may be compelled to attend in any county specified in the order."

The entire opinion of Mr. Justice Whitaker on this point is worthy of careful consideration, as it provides considerable food for thought. He denied the motion to vacate the notice and said:

"Concerning the right of the plaintiff to take the testimony of an adverse party who resides out of the state, pursuant to notice, it may be that Section 300, C. P. A., applies. Whether that section applies to the examination of an adverse party or only to a witness is uncertain. I do not just see how the court can acquire jurisdiction over a non-resident simply by giving notice to the attorney requiring the non-resident to appear for examination. I do not think, however, the court should vacate the notice. It may be by procuring an order for the examination of the defendant and serving it upon him in this state, pursuant to Section 300, C. P. A., might sustain plaintiff's right to the examination (see Wallace v. Reinhardt, 11 Misc., 519)."

While it may and undoubtedly is true that Sections 288 and 300 are somewhat ambiguous, I should interpret Section 288 as plainly giving the right to examine adverse parties whether residents or non-residents. Furthermore, it seems to me that the two sections when read together indicate that the right exists in the alternative to examine a non-resident, whether he be a party or an ordinary witness, *either* pursuant to the method of serving a notice *or* by obtaining an order. Where the non-resident refuses to come within the

state so as to be served with a subpoena, then his testimony will have to be taken by the means devised in reference to the ordinary taking of depositions out of the state for use within the state which will be presently discussed. As there is no way of telling with certainty whether the person sought to be examined will come within the state and thus be subject to the service of a subpoena, the decision of Mr. Justice Whitaker in denying the motion to vacate the notice in *Bassel v. Selis* seems to be clearly sound.

To return to the question of a motion to strike out a pleading for disobedience of the notice, let us suppose that one of the parties absents himself from the state so that his whereabouts are unknown and he is consequently not subject to the normal procedure for the taking of the testimony of a person without the state. Let us further suppose that the notice for the taking of the testimony of this party is duly served upon his attorney and facts are shown which make it appear that the party is deliberately absenting himself from the state and concealing himself so as to avoid giving testimony as required in the notice. I take it that under these circumstances the court would be warranted in granting a motion to strike out the answer of the defendant as a penalty for his contumacious behavior, and this could be done in spite of the fact that no subpoena had been served.

Another point which has arisen with reference to the taking of depositions pursuant to notice is as to whether a notice for the examination before trial of an adverse party may be lawfully served *before joinder of issue*. As a matter of policy my own feeling in the matter is that examinations before trial ought to be permitted with the utmost liberality and under

almost any and all circumstances, except where shown to be for the purpose of harassment or indirect blackmail; and accordingly as a matter of policy I see no objection to the service of the notice before joinder of issue. On the other hand, Section 288 provides that such testimony may be taken where it is "material and necessary in the prosecution or defense of the action," and Section 290 provides that the notice shall contain a statement of "the issues upon which such person or persons are to be examined." As it would not seem ordinarily possible to determine what the issues are until after joinder of issue, and as it would seem to be difficult to determine whether the testimony was material and necessary until after the service of the answer, I should have said that the examination could not be held until after joinder. The question is certainly open to some doubt, however, and it was recently intimated by Mr. Justice Giegerich at Special Term, Part I, of the Supreme Court, New York County, in *Norman Oil Corporation v. Bensabat* (N. Y. L. J., Feb. 2, 1922), that an examination before trial pursuant to notice might be had before joinder of issue. On the other hand, it has been directly held that it is improper to serve a notice to take testimony before trial before issue joined (*Publishers' Press v. Federal Telegraph Co.*, Supreme Court, New York County, Special Term, Part I, Wasservogel, J., N. Y. L. J., June 3, 1922; *Norman Oil Corporation v. Bensabat,* Supreme Court, New York County, Special Term, Part I, Bijur, J., 118 Misc. 398).

As to the number of successive notices which might be served, there is the following significant *dictum* by Mr. Justice Bijur in *Norman Oil Corporation v. Bensabat, supra:*

"In passing it may be said that I am not even suggesting that notices for the examination of parties may be served without number and in endless succession. Where such a situation is presented the court has ample power to prevent either abuse of its process or useless and vexatious anoyance of any party to a litigation."

Motions to vacate or modify notice.

While the ordinary method prescribed by the Civil Practice Act for the taking of depositions is very simple and involves merely the service of a notice and subpoena as above described, there are still a great many points which may arise not only with respect to the right to take the deposition, but also with reference to such details as the scope of the examination, the place where the notice is returnable, and the person before whom the notice is returnable. Section 291 provides that these points are to be raised by a motion to vacate or modify the notice. As provided in Section 291:

"The motion shall be heard upon the notice of the taking of testimony, the pleadings, if any, and upon such affidavits in support of such notice, and in answer thereto, as the parties may submit. If the taking of the testimony be not authorized by the provisions of this article the court shall vacate the notice."

Rule 124 further provides that the party making the motion to vacate "shall specify in his notice of motion the grounds of the motion" and by this rule the court is not only given the power to vacate the notice where it appears that the testimony sought to be taken is not material or necessary and to modify it if it is not returnable at a proper place or before a proper person, or if it does not properly state the issues upon which the examination is to be held, but the court is also given the right to grant the motion to vacate the notice where it appears "for any reason that the interests of

justice would not be subserved by such examination." There are several points in connection with the motion to vacate under Section 291 and Rule 124 which must be very carefully examined in some detail. One thing is plain at the outset, and that is, that the court will grant or deny a motion to vacate the notice only upon the basis of the really substantial requirements of law, namely, as to whether or not the testimony is material or necessary, as to whether the notice complies with Section 290, as to whether some reason exists which indicates that the interests of justice would not be subserved by such examination, and so on. It is not very clear, however, as to whether the burden rests upon the party making the motion to vacate the notice, or upon the party on whose behalf the notice was originally served. Section 291 is entirely silent on this matter, and merely provides that the motion to vacate the notice shall be heard upon the notice itself, the pleadings, if any, and upon such affidavits in support of the notice and in answer thereto as the parties may submit. Rule 124 directs the party making the motion to vacate to specify the grounds of the motion and the rule continues that he "may support the same by affidavit, which shall be served with the notice of motion." It is very evident that it was intended that both sides should submit such evidence as was at their disposal, and that the court should grant or vacate the motion upon the basis of the essential facts thus shown by affidavit. I find nothing in either Section 291 or Rule 124, however, which clearly fixes the burden upon either one side or the other.

It is rather interesting to note that in the letter sent by Mr. John Godfrey Saxe to the New York Law Journal and published therein on January 16, 1922, to which reference has already been made, Mr. Saxe takes

the position that it was contemplated that, upon the service of the motion papers, the party originally serving the notice would then be compelled to produce evidence to justify the service of the notice, thus fixing the burden not upon the party serving the notice of motion to vacate the notice, but upon the party on whose behalf the notice was originally served. Mr. Saxe says:

"Under our new practice, where any party desires to examine a witness, either 'any adverse party' or 'any other person,' he gives reasonable notice to his adversary, stating, in writing, the person before whom the testimony is to be taken, the time and place, the names of the witnesses and the issues upon which they are to be examined (C. P. A., sec. 290). Any question may be raised by motion to vacate or modify the notice. The moving party has merely to raise the question. The burden is then upon the party who has given the notice to sustain it, and the moving party may then present his affidavits in opposition. Thereupon the court makes an order determining the question so raised (C. P. A., sec. 291)."

This point as to the burden of proof does not seem to be of any very considerable practical importance, in view of the fact that the court will decide the matter, not upon the basis of any purely technical omission, but upon the basis of the essential facts. Thus the old practice under the Code, by which the person desiring to take the testimony before trial was required to obtain an order upon an affidavit which was supposed to set forth in detail a certain number of facts, and the attorney for the party making the motion to vacate had ample time to examine the order and the affidavit and pick flaws therein at his leisure, is fortunately a thing of the past.

It is also to be noted that the omnibus provision of Rule 124 gives the court ample power to prevent the taking of testimony before trial merely for the purpose of harassment. Thus I suppose if a young girl

brings an action for breach of promise of marriage against a wealthy old man 75 years of age, and the plaintiff serves a notice upon the attorney for the defendant requesting the defendant to appear and submit himself to examination at a certain time and place with respect to whether or not he made the promise of marriage, the courts would be pretty sure to take the position that the interests of justice would not be subserved by such examination.

Perhaps it is well to add a word at this point with respect to the well worn phrase "fishing expedition." Not so many years ago it was the practice of the courts to vacate orders for examinations of parties before trial wherever there was any indication that the order had been obtained merely for the purpose of fishing around into the other man's case in the hope that certain evidence might develop which would be of general assistance to the party conducting the examination. Accordingly, a very strong showing was required that the testimony to be taken was really material and necessary. I have never felt any sympathy for this "fishing expedition" rule, as it has always seemed to me that the right should exist almost without limit to examine a party to a pending litigation. I do not mean to include cases where the examination is conducted for the purpose of blackmail or harassment, as those cases obviously stand upon a different basis. I do maintain, however, that there is nothing out of the way in conducting a "fishing expedition" and if the adverse party does know of any facts which may be developed and which may be of importance on the trial of the action, it has always seemed to me that the rules with respect to the taking of such testimony should be as broad and liberal as possible. There is no means of

telling with certainty how the courts will finally rule on this point under the provisions of the Civil Practice Act, but I am rather inclined to believe that the old "fishing expedition" rule is too firmly entrenched to be dislodged without some plain statement to that effect in the statute. I sincerely hope, however, that the taking of depositions will be permitted in every case where it cannot be shown affirmatively by the party making the motion to vacate the notice, that testimony sought to be elicited has no bearing on the case and is not material or necessary. There is a distinct tendency in this direction in a recent decision of Mr. Justice Ford, at Spec. Term, Part I, of the Supreme Court, N. Y. County, in *Shaw v. Samley Realty Co., Inc.* (N. Y. L. J., Feb. 10, 1922), where he says:

"I can conceive of no valid reason why examinations before trial should be less liberal in negligence than in contract cases for example. The former class takes up more of the time of our courts than any other. For some years the practice has been progressively broadening in respect of these examinations generally, and doubtless they serve the ends of justice and lessen the number of actual trials. By means of depositions before trial the parties are required to put all their cards on the table. That cannot injure the honest cause. The new Practice Act seems to open the door still wider than heretofore for searching out the real facts before trial, and I do not think that litigants in negligence cases should be restricted in their full enjoyment of these privileges."

On the other hand, Mr. Justice Dike at Special Term, Part I, of the Supreme Court, Kings County, in *Fromm v. Grisman & Palm Knitting Co., Inc.* (N. Y. L. J., May 24, 1922), took occasion to emphasize the fact that it was still possible to examine an adverse party only in support of one's own affirmative case, and with respect to "fishing excursions" he said:

"The general rule for examinations before trial is that the applicant can have an examination only to prove *his own affirmative case*. This is one of the foundation rules under this section

of the Civil Practice Act (Section 288) which took the place of the former section of the old Code, and, with all the generous spirit of the provisions in the new Act, still will not permit fishing excursions or efforts to pry into the case of one's opponent."

There is another feature of Section 291 which is very puzzling and which I think should be amended. I refer to the following portion thereof:

"The service of notice of the motion, if made for the first term or sitting of court at which the motion can be heard, shall operate to stay the taking of the testimony until the determination of the motion. If the motion is brought on by order to show cause, the order may be returnable either at chambers or to the court and may contain such a stay."

Naturally, a person making a motion to vacate a notice for the taking of testimony before trial would under no circumstances desire to place himself in default pending the determination of the motion to vacate. The provision just quoted hardly seems to be adequate, particularly in cases pending in New York City, where in New York, Bronx and Kings Counties there is a Special Term motion day every day of the year except Saturdays, Sundays and holidays. In portions of the state where there is a motion day every other Saturday or once a month, the phrase "if made for the first term or sitting of court at which the motion can be heard" may have some value; but in those counties where most of the judicial business is done this phrase is of no value as it would require the attorney upon whom the notice is served to *on the same day* prepare his motion papers on the motion to vacate and cause the same to be served returnable at Special Term five days hence, as this is the only way he could make the motion returnable at the first term or sitting of court at which the motion could be heard.

The result is that in many counties of the state the

motion to vacate will have to be by order to show cause containing a stay of proceedings pending the determination of the motion as provided by Section 291. This is certainly the safe and conservative method to pursue.

Examination pursuant to order.

It must not be supposed from the discussion concerning the service of a notice that all examinations before trial under the Civil Practice Act are to be brought on by that method alone. The service of the notice may be fairly characterized as the normal method, but it is in no sense the only method, as in a great many instances the Civil Practice Act specifically requires the use of an order. Furthermore, a party is always given the alternative to proceed by way of order, should he so desire. Thus Section 292 provides:

"A party entitled to take testimony by deposition may obtain an order of the court therefor in the first instance, instead of proceeding by notice. The motion shall be upon notice to the other parties."

It will be observed that this order to be used in the alternative, in lieu of the notice, is not an ex parte order as obtained and used under the Code, but an order obtained after a regular motion upon notice to the other parties. Rule 122 provides generally with respect to what must be shown by the party applying for such an order, or indeed, for any order for the taking of testimony before trial pursuant to any of the provisions of Article 29 of the Civil Practice Act. It is a notable fact that this rule does not repeat all the technical details formerly contained in the Code, but merely requires proof by affidavit that statutory grounds exist for taking the testimony and that

the testimony is material and necessary in the prosecution or defense of the action. There is a further provision that if the order is for the taking of the testimony of a corporation, the affidavit must state the office or position in such corporation held by the person whose testimony is sought to be taken; or if the production of books or papers is desired, the affidavit must describe the books and papers so far as practicable and state facts to show that their production is material and necessary.

There are a number of instances where the Civil Practice Act requires an order and does not permit the use of a notice in the alternative. These instances are as follows:

Where the testimony is sought to be taken "during the trial of the action," or "after judgment in order to carry the judgment into effect," an order must be obtained and a regular motion upon notice must be made therefor (Section 293).

Where it is sought to take the testimony of an expected party in the prosecution or defense of an action "about to be brought in a court of record," here again an order is required. It is significant, however, that Section 295 which relates to this instance is entirely silent on the question of whether the order may be obtained ex parte or upon notice. As Section 293 expressly provides that an order obtained pursuant to the provisions of that section must be upon notice, the inference may be fairly drawn that an order obtained under Section 295 may be obtained ex parte. This very point was recently decided by the Appellate Division of the First Department in *Newman v. Potter* (decided in May, 1922, N. Y. L. J., June 3, 1922), where it was held that Section 292 applies to all orders,

whether obtained in lieu of the service of a notice or because an order was absolutely required. Hence, at least in the First Department, all orders for the taking of depositions must be obtained by motion upon notice to the other parties to the action. It is also worthy of note that Section 295, which permits the taking of testimony pursuant to order where an action is about to be brought, extends the right to take depositions *outside of the state* for use in an action about to be brought.

Whenever the production of books or papers is desired here again an order must be obtained (Section 296), and it is now specifically provided that on the examination, the books or papers or any part thereof, may not only be used to refresh the recollection of the witness, but may also be offered and received in evidence. This provision is of considerable importance in view of the doubtful state of the decisions on this subject under the Code. There was a special provision in the Code in case of the taking of the testimony of an officer of a corporation before trial to the effect that the order might direct the production of books or papers and that such books or papers may be used not only to refresh the recollection of the witness, but might also be offered in evidence. There was great doubt as to whether this could also be done in the case of taking the testimony before trial of an individual. Now the practice is clarified and made general so that whether the testimony be that of an individual party or that of an officer of a corporation, in either event, the order may direct the production of books and papers and these books and papers may be fully used upon the examination and marked in evidence.

Where the testimony of a person in prison is sought to be taken, Section 297 requires an order of the court

and that section provides that the granting or refusing of such an order is always discretionary.

On the subject of the physical examination of a plaintiff in a personal injury action, it is also provided that an order must be obtained (Section 306). There is, however, a curious change in the practice which I am at a loss to understand. The common practice under the Code was to obtain an order for the physical examination of the plaintiff and that order customarily directed the plaintiff to, upon such physical examination, give oral testimony. It was only possible under the Code to obtain the order in this form combining the physical examination and the oral examination together. It is now provided in Section 306 that the order may simply direct the plaintiff to appear for physical examination or for oral examination or both together. I am afraid that I do not quite appreciate the importance of this change as it seems to me that it would be a very futile thing to direct the plaintiff to appear for physical examination and not to also direct him to answer proper questions at the time the examination was being conducted. Surely it is important in every case for the doctor conducting the examination to not merely observe such objective symptons and conditions as may exist but to also, by proper questions, elicit information concerning purely subjective symptoms.

There is another provision in Section 306 to the effect that the order directing the plaintiff to submit to a physical examination is now to specifically designate the physician or surgeon who is to conduct the examination. Whether it is thus intended to have the court in every case appoint some entirely disinterested physician, I do not know. It seems to me, however,

that there should be no objection to permitting the defendant to name his own physician to conduct the examination and thus prepare to give testimony with respect to the injuries at the trial. Perhaps it will be customary under Section 306 of the Civil Practice Act for the defendant to suggest the name of the physician and thus have practically the same advantage from such an examination as he had under the Code. This apparently is a matter which rests entirely in the discretion of the courts.

There is a further provision with reference to the taking of testimony of a person not a party for use upon a motion where the use of the affidavit or deposition of such person is necessary, and he has refused to make an affidavit with respect to the facts (Section 307). Such testimony may only be taken pursuant to order and Rule 120 provides that an application for such an order is made on *one day's notice;* and the affidavit upon which the motion is based must show that the applicant intends to make the motion or that he intends to oppose a motion already made, that the deposition is necessary for use in connection with the motion, and that the person whose deposition is sought to be taken has refused to make an affidavit of the facts which the applicant believes are within his knowledge. If such an order is made, it will appoint a referee and the person whose testimony is sought to be taken is brought before the referee by subpoena and is there subject to examination and cross-examination as though he were attending a trial. When the deposition is completed and subscribed and sworn to by the witness, it is to be delivered to the attorney who procured the order and he may make such use of it in connection with the motion as he desires.

The idea of taking a deposition for use on a motion is not in any sense new as the provisions now contained in Section 307 and Rule 120 are substantially taken from Section 885 of the Code.

Where it is sought to issue letters rogatory, here again an order is specifically required by Section 309.

Deposition pursuant to stipulation.

Section 298 provides for the taking of testimony generally by stipulation except that the testimony of a person confined in prison under sentence for a felony may not thus be taken.

Apparently Section 298 was included merely because there was a similar provision in the Code, and this section is supplemented by Rule 125 which provides that the stipulation must be filed in the office of the Clerk before any proceedings are taken thereunder, unless the testimony is taken on written interrogatories.

Rule 125 also contains the following curious provision "if an order to take testimony by deposition be made by a judge, out of court, it must be entered in the office of the clerk." It is to be noted that this rule does not provide *when* the order is to be entered. If the absence of any requirement as to the particular time for entering the order is to be regarded as an indication that the order may be entered *at any time,* then this portion of Rule 125 is of no value whatsoever as the order might be entered after objection had been made to the use of the deposition upon the trial. In all probability the fair interpretation of this portion of Rule 125 is that the order must be entered *before the deposition is taken.* The meaning is certainly obscure and apparently requires some clarification by amendment.

Conduct of Examination.

With reference to the conduct of the examination the practice is practically the same as under the Code, except that books and papers may now be offered and received in evidence in addition to the use thereof by the witness to refresh his memory (Section 296). Section 305 provides that ordinary objections to questions asked upon a deposition may be reserved for the trial, "but an objection as to the form only of a question is waived unless noted upon the deposition." While there are many very obvious instances where the objection is merely one of form, a good many border-line cases are presented so that it is very desirable to note the objection during the course of the examination before trial where any doubt exists.

Section 302 provides that if the testimony is taken within the state, the examination shall be upon oral questions unless the parties otherwise stipulate; and such matters as the swearing of the witness and the disposition of contested questions by submission thereof to the court perhaps need no discussion. Section 302 also contains a new provision to the effect that the testimony is to be taken in question and answer form "unless the parties consent or an order directs that only the substance of the testimony be inserted." Where the notice or order is made returnable at the Special Term for the hearing of ex parte business, it is, of course, contemplated that the judge sitting at that Term will summarily pass upon the admissibility of questions to which objections have been raised, just as this was done under the Code. On the other hand where the testimony is taken pursuant to notice and the notice is returnable before some notary public or attorney, it would seem necessary to make a motion

returnable at the Special Term for the hearing of contested motions to obtain a decision on the contested questions. In many instances the judge sitting at the Special Term for ex parte business may pass upon such questions, even though the examination is being conducted pursuant to notice returnable before a notary public or attorney, but it would seem as though this would merely be a courtesy on the part of the judge and not required in the same sense as though the notice or order were there returnable.

When the deposition is completed, it is necessary to add the customary certificate which was used under the Code as Rule 129 requires that the deposition when completed must be read carefully to the person examined and subscribed by him. A simple jurat at the end of the deposition would thus be irregular.

Adjournments are covered by Rule 127 which gives the officer or person before whom the testimony is taken the authority to adjourn the hearing from time to time, as long as it is not adjourned to a place outside of the county where the notice or order was originally returnable.

After the deposition has been completed, read over and signed, Rule 132 requires that it be filed "within ten days after its completion and return" in the office of the clerk of the court in the county in which the action is to be tried.

LECTURE VI.

Depositions taken without the State for use within the State.

A good deal of confusion seems to exist on the subject of taking depositions out of the state for use within the state which is probably due to the fact that Article 29 of the Civil Practice Act covers the entire subject of depositions, whereas formerly under the Code there was a separate set of provisions applicable to depositions taken out of the state and to depositions taken within the state. It must be admitted, however, that the subject is treated in a very confusing way in the Civil Practice Act, thus requiring a very careful study of the various sections.

To begin with, the taking of testimony without the state for use within the state is covered by Section 288, and as Section 290 is general in its terms, it is contemplated that testimony may be taken out of the state by notice. By the terms of Section 292, it is also contemplated that testimony be taken out of the state pursuant to an order obtained after the making of a regular motion therefor. It is also contemplated by Section 294 that testimony be taken out of the state pursuant to an order which "may direct the issuance of a commission." We thus find three alternatives: (1) the mere service of a notice; (2) the making of a motion for an order which shall contain such special provisions as to the taking of the testimony as may be thought desirable; and (3) the making of a motion for an order directing the issuance of a commission. Under

the third method a party desiring to take testimony outside of the state may now proceed substantially in the same way that he would have proceeded under the Code. This explains Rules 126, 128, 130, 131, 132 and 133 which contain, with very slight changes, the provisions with reference to the service and settlement of interrogatories, the preparation of the papers to authorize the taking of the deposition and the specification of the directions to be given to the officer before whom the testimony is taken without the state, just as these matters were formerly covered by the old General Rules of Practice and the provisions of the Code as to the issuance of a commission and the taking of testimony thereunder. Where proceeding pursuant to an order directing the issuance of a commission, it is important not to attempt to use any of the old printed forms which refer to the old sections and rules and the use of which would probably give rise to many irregularities. I understand that new printed forms have already been issued, although some of the stationers seem to be still attempting to get rid of their supply of the old forms.

There is one very important respect in which the practice as to taking depositions out of the state has been simplified. This is the second method by which a party desiring to take a deposition out of the state merely makes a motion for an order, the particular terms and provisions of which are to be discussed on the argument of the motion and thus disposed of. Thus Section 294 provides:

"An order for the taking of testimony by deposition, under any provision of this article, or an order denying a motion to vacate a notice given pursuant to section two hundred and ninety, may prescribe terms and conditions, not inconsistent with this article. If the testimony is to be taken wholly or partly upon oral

examination, the order shall provide for notice thereof to the parties, or prospective parties, of the time and place and, in the discretion of the court, the order may fix such time and place."

It is thus contemplated that the parties need not resort to the issuance of a commission and the full compliance with the somewhat cumbersome rules as to the preparation of the interrogatories, the cross-interrogatories and the settlement thereof by the court. Where some special exigency exists the matter can be thoroughly discussed on the argument of the motion for an order directing the testimony to be taken and that order may provide such reasonable terms and conditions with respect to the taking of the testimony as the circumstances may seem to require.

Now a word as to the taking of depositions outside of the state pursuant to notice. It is evidently contemplated by Section 294 that if one party serves a notice to take the testimony of some person outside of the state, his adversary will promptly move to vacate or modify the notice and the order denying the motion to vacate, or granting the motion to modify the notice, may provide such terms and conditions as to the taking of the testimony as may be appropriate. If the adversary is accommodating in this respect and makes his motion to vacate, then the order thus made would no doubt fully cover the situation. But if the adversary makes no motion to vacate, it is at least a doubtful proposition as to whether or not the mere service of the notice will establish a proper basis for the taking of the testimony in a foreign state. I am afraid that the courts in California or New Jersey, for example, might be somewhat reluctant to enforce obedience to a paper such as the notice we are discussing, which is merely signed by the attorney and

not in any way authenticated or certified by any official of the State of New York. It may be that the mere service of a notice will in time prove sufficient, but there are difficulties to be expected which would make it more desirable, at least at this time, to either move for an order directing the issuance of a commission or for an order directing the taking of the testimony without the state and imposing the terms and conditions under which such testimony is to be taken.

Rule 133 provides for a motion to suppress a deposition taken without the state where there is any improper conduct or irregularity in the taking or return of the deposition or where the attorney for either party has practiced fraud or unfair or over-reaching conduct. Rule 133 also provides:

"If it appear that a resident of the state whose deposition was taken without the state could have been subpoenaed to attend the trial, his deposition may be suppressed unless he resides more than one hundred miles from the place of trial."

Use of depositions at trial.

Where the deposition is that of an individual adverse party it is very plain that the deposition may be used at the trial even though the party himself be personally present in court. This is apparently upon the theory that whatever is said by an individual party constitutes an admission and is to be received in evidence as such.

Where the deposition is that of the officer of a corporate party, it would seem as though the rule applicable under the Code had been preserved in Section 304 of the Civil Practice Act, to the effect that if the officer of such corporation is personally present in court, the deposition may not be read. This distinction between

the testimony given by individual parties and testimony given by officers of corporations, is apparently sound, although as a matter of policy, it would seem desirable to place both depositions upon the same basis and to make them both admissible, even though the person so testifying is actually in court at the time it is sought to read the deposition. The leading case on this proposition under the Code is *Miners and Merchants' Bank v. Ardsley Hall Co.*, 113 App. Div. 194, and the reasoning of the court is that the deposition of an officer of a corporation is not the deposition of a party, but the deposition of a witness and that accordingly it did come under Section 882 of the Code which provided that the deposition, *except that of a party taken at the instance of an adverse party,* shall not be read in evidence until it has been satisfactorily proved that the witness is dead or unable to personally attend by reason of insanity, sickness or other infirmity. As the provisions of Section 882 of the Code are now repeated almost verbatim in Section 304 of the Civil Practice Act, the rule of the *Miners and Merchants' Bank* case would seem to be still applicable.

Turning to the depositions of witnesses generally, other than parties, Section 304 very clearly provides that such depositions shall not be read in evidence

"unless it appears to the satisfaction of the court that the deponent is then dead or is out of the state or at a greater distance than 100 miles from the place where the court is sitting, or that, by reason of insanity, sickness, or other infirmity, or imprisonment, he is unable to travel to and appear at the court, or that for any reason his attendance cannot be compelled by subpoena, with the exercise of reasonable diligence."

This proof that the witness is not available, must be affirmatively made before the deposition can be deemed admissible at the trial.

As the provisions with reference to depositions to be taken within the state for use without the state and the provisions for the perpetuation of testimony in real property actions are practically repeated verbatim from the Code, they will not be discussed in detail (Sections 310-321).

Incidental Practice.

A large number of changes have been made with reference to various phases of incidental practice and these matters will now be discussed together, although it is impossible to take them up in any strictly logical sequence.

For some reason which is certainly not apparent to me, Section 236 which covers the general subject of the rights of a party who is of full age to prosecute or defend a civil action in person, has been amended so as to give the court the affirmative power to permit a party to appear to act in person in a case even though the party is already represented by an attorney. This is contained in the last sentence of Section 236, which reads, "If a party has an attorney in the action he cannot appear to act in person except with the consent of the court." As no such power existed under the Code, the effect of this negative statement is to create an affirmative privilege.

In my judgment this change, although apparently a good one, will not work well in practice and will serve as a source of embarrassment to both the judges and to lawyers. Naturally in the vast majority of cases in which clients of ordinary intelligence are involved, the courts will not be called upon to force the attorney from the case and to permit the client to conduct the trial for himself. It is only in cases where the extent

of the interests involved has preyed upon the mind of the client or where either by reason of age, illness or other partial disability, the client may for some reason or for no reason desire to himself conduct the case. In such instances the interests of the client are almost inevitably bound to be damaged by the ouster of the attorney in the midst of a trial, with the result that the case may be lost to the disadvantage of the client and the lawyer as well, as the latter may be depending upon his charging lien to receive compensation for his services.

It would seem as though the remedies already available to parties were amply sufficient to protect them, as the lawyer may at any time be removed without compensation where he has been negligent in the conduct of the case, or guilty of unprofessional conduct, and, even where no such conduct can be shown, the client may as a matter of course change attorneys at any time by merely paying to the attorney who is discharged the reasonable value of his services to date.

Let us take an illustration. Let us suppose that a lawyer is representing an old lady eighty-five years of age in a litigation of great moment to the client, who has thought of practically nothing else for five or ten years, so that while on other matters she may be entirely normal, still with respect to this case her mind is at least somewhat affected. As the case progresses the old lady has her own ideas as to how it should be tried and as to what documents should be put in evidence, what witnesses called, what questions asked, and so on. Upon a sharp difference in opinion developing between the lawyer and his aged client, she tells the judge she desires to continue the trial of the case herself. I believe it is a great mistake to make it possible

for the court to thus oust the attorney and permit the client to try the case in person.

Perhaps the tendency of modern times lies in the direction of giving clients more ample power in connection with their own law suits. This is shown by another phase of Section 236 of the Civil Practice Act. May a client, who is plainly authorized by Section 236 to prosecute or defend a civil action in person, himself sign and issue a summons and cause an action to be started by the service thereof upon the defendant? As a matter of policy it would seem very clear that the right to issue the mandate of the court should be restricted to the officers thereof; and it was not so long ago held by Mr. Justice Cropsey at Special Term, that a layman had no power to sign and issue a summons (*Jaworower v. Rovere,* 98 Misc. 377, affirmed without discussion on this particular point, 177 App. Div. 740).

As a matter of logic, as well as general policy, this decision by Mr. Justice Cropsey seems to rest upon very solid foundations. The subject was one which very plainly involved two sections of the Code, namely, Section 55, relating to the right of a party to prosecute or defend an action in person (now Section 236 of the Civil Practice Act) and Section 417 of the Code relating to the form of the summons (now Rule 45 of the Rules of Civil Practice). Not only does Rule 45 specifically provide that the summons "*must* be subscribed with the name of the plaintiff's *attorney,*" but as pointed out by Mr. Justice Cropsey in the *Jaworower* case, the section as originally phrased, expressly made it possible for the summons to be signed either by the plaintiff or by the plaintiff's attorney. In 1870 the forerunner of Section 417 of the Code was amended by eliminating the provision that the plaintiff might sub-

scribe the summons, thus indicating a very clear legislative intent that the summons be signed by an attorney and not by the plaintiff himself. It requires no argument to sustain the ruling that the section with reference to the form of the summons and the section with reference to the right of a party to prosecute or defend an action in person, must be construed together and if possible reconciled. Mr. Justice Cropsey did construe them together and reconcile them by his decision that a party might prosecute or defend an action in person except that he could not sign and issue the summons which was the mandate of the court.

In spite of this cogent reasoning by Mr. Justice Cropsey, the Appellate Division of the First Department has since held that a layman has the right to subscribe and issue the summons himself (*Horter v. DeMesa,* 196 App. Div. 462). It is a significant fact that the Appellate Division does not mention the decision of Mr. Justice Cropsey in the *Jaworower* case, nor is there any discussion whatever of the reasons upon which the decision is based. The result is probably that the decision in the *Horter* case and the change in Section 236 of the Civil Practice Act, to which reference has already been made, are merely indications of a modern tendency to make it possible for laymen to dispose of their controversies in court without the presence of lawyers.

Tender.

There are two very important changes in the practice with respect to the making of a tender to avoid payment of costs. The rule under the Code was that if the defendant made a tender by paying a certain amount of money into court, and the defendant then

won the case, the money nevertheless was the property of the plaintiff. This was upon the theory that the title to the money passed to the plaintiff upon the deposit thereof in court (*Taylor v. Brooklyn Elevated Railroad Co.*, 119 N. Y. 561). It is a curious circumstance that this peculiar and wholly unjust rule remained untouched and unamended in spite of efforts by a great many disinterested members of the bar to have it repealed. The result, of course, was that after the decision by the Court of Appeals in *Taylor v. Brooklyn Elevated Railroad Co.*, 119 N. Y. 561 (decided in 1890), the process of making tenders under the Code gradually ceased with the result that the provisions of the Code in this respect did very little, if any, good.

The old rule has been changed by Section 173 of the Civil Practice Act, subdivision 1 of which affirmatively provides that "if the defendant recover judgment, the money shall be paid to him."

The other change concerning tenders is contained in Section 174, which is entirely new and which provides as follows:

"Sec. 174. Tender on counterclaim.
A tender may be made by the plaintiff in respect to a counterclaim, in the same cases, in the same manner, and with the same effect as to the counterclaim, as in case of a tender by a defendant on account of a demand for payment in a complaint."

Extensions of Time.

There is a new section taken from the English Practice Rules with respect to the general subject of extensions of time. That is Section 98 which provides as follows:

"Except as otherwise expressly provided by statute, the court or a judge shall have power after the commencement of an action

or special proceeding to enlarge the time appointed by statute or rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms as the justice of the case may require, and any such enlargement may be ordered upon good cause shown although the application for the same is not made until after the expiration of the time appointed or allowed."

In view of the provisions formerly contained in Sections 781 and 783 of the Code, there does not appear to be any radical change involved in the adoption of this language taken from the English Practice Rules. It is true the language is more general and may be supposed to cover some cases not included in the Code provisions, but generally speaking the courts had the power even under the Code to extend time and open defaults of every character upon good cause shown and upon the imposition of proper terms.

One of the few reported decisions on this point since October 1, 1921, is in the case of *Wulstein v. Wulstein,* decided by Mr. Justice Gannon at Special Term, Part I, of the Supreme Court, Kings County (N. Y. L. J., June 2, 1922). In that case the interlocutory judgment was served with notice of entry on March 8, 1922, and the time of the defendant to move for a new trial was extended by stipulation to April 10. Section 552 of the Civil Practice Act provides that the motion for a new trial must be made "before the expiration of the time within which an appeal may be taken from the judgment" and Section 99 forbids any extension of the time to appeal. The defendant ex parte obtained an order further extending his time within which to move for a new trial and the plaintiff moved to vacate this order. In denying this motion Mr. Justice Gannon said:

"But the time to appeal from the interlocutory judgment has not expired, no final judgment having been entered, because an appeal from the final judgment when entered 'brings up for review

an interlocutory judgment * * * which necessarily affects the final judgment' (Section 580, C. P. A.). As for the claim that the order should have been made upon noticed motion, the facts which are not disputed would justify the order even if the motion were opposed."

It seems to me that it is much to be regretted that the Legislature did not follow the English rule *in toto* and thus include not only the power to enlarge or extend time, but also the power to *abridge* the time for doing an act or taking a proceeding. It is a matter of common experience that on many occasions the normal period within which a party to a civil action is required to do certain acts is much too long, in view of the facts of particular cases, and the interests of justice generally would seem to require that the court be given the broad general power to abridge time as well as to extend time. For instance, take an ordinary action for goods sold and delivered, for money loaned, or upon a promissory note or other evidence of indebtedness. In most of these cases the defendant should not be given twenty days to answer the complaint and it is difficult to see what harm could be done in giving to the court, upon application duly made, upon notice, the power to cut this time down to ten or even five days.

The general limitations upon the power of the courts to extend time within which to commence an action, take an appeal, and so on, are repeated in Section 99 without substantial change from the language used in the Code.

Amendments of course.

One of the curious things about the Civil Practice Act is that one may read over and over again the language of particular sections contained therein, without realizing that any substantial change has been

made. I could give a number of instances where I have experienced this difficulty myself. Perhaps the best instance, however, arises in connection with Section 244 relating to the service of amended pleadings as a matter of course. I believe I must have read that section at least twenty or thirty times without realizing that a change of great importance had been made. You will recall that under the Code the right to amend as a matter of course arose in two ways: first, within twenty days after the service of one's own pleading; and, second, within twenty days after the answer, demurrer or reply thereto was served. Accordingly, if a complaint is served on May 1st, the plaintiff had, under the Code the right within twenty days thereafter to serve an amended complaint as a matter of course and after the service of a demurrer or answer he *also* had the right to serve an amended complaint as a matter of course within twenty days. This right to amend as a matter of course could only be once exercised, but there were the two periods mentioned. Under Section 244 of the Civil Practice Act the first period is preserved intact, but the second period had been eliminated. In other words, within twenty days after the service of a pleading the party serving the same has the right to serve an amended pleading once as a matter of course. He also has the right to serve an amended pleading once as a matter of course "within twenty days after the service of a notice of a motion addressed to the pleading." The significant point is that the pleader has not now the right to amend once as a matter of course within twenty days after the service of the answer or reply to his original pleading. To be specific, if the complaint is served on May 1st and the answer thereto is served on May 21st, the plaintiff may

not serve an amended complaint within twenty days thereafter, as a matter of course. This he could do under the Code, but cannot do under the Civil Practice Act.

Bonds and Undertakings.

There are a number of new provisions with reference to bonds and undertakings which will probably not be of great general interest to the profession as these matters are largely attended to by surety companies at the present time. They are worthy of a brief reference in passing, however.

Section 157 is entirely new and provides that wherever the Civil Practice Act or the Rules authorize and require cash bail or security, negotiable bonds of the United States Government may be delivered in lieu of cash "to the amount of the face value of the bond." As most of the Liberty Bonds of the United States Government were selling below par when the Civil Practice Act took effect, a great many people immediately took advantage of this new section. As the Liberty Bonds approached par, and as they will in all probability soon be selling above par, the use of Section 157 will probably diminish. It seems more of a temporary provision than one of permanent value.

In Section 148 the following entirely new sentence has been added:

"Unless otherwise provided by statute or rule, whenever a bond or undertaking is required in a civil action or special proceeding, it shall be to the effect that the principal shall faithfully and fairly discharge the duties and fulfill the obligations imposed by law or rules and the special order of the court."

This sentence requires no explanation and serves to eliminate many technical matters in connection with

bonds generally which had in the past led to unfortunate results.

In Section 151 the rules applicable to the justification of sureties in connection with undertakings on appeal to the Court of Appeals has been extended to bonds and undertakings generally in all actions or special proceedings.

Section 154 now includes in a single section with reference to bonds and undertakings provisions for the protection of the interests of an infant, lunatic, idiot or habitual drunkard, which were formerly to be found in several of the General Rules of Practice and in several separate Code sections.

Sale of Perishable Property.

An entirely new section taken from the English Practice Act has been added to Article 61 of the Civil Practice Act with reference to the disposition of property in litigation. This new section (Section 980) refers to the sale of perishable property and is as follows:

"It shall be lawful for the court in which an action or special proceeding is pending, or a judge thereof, on the application of any party, to make any order for the sale, by any person or persons named in such order, and in such manner, and on such terms as the court or judge may think desirable, of any goods, wares, or merchandise, which are the subject of such action or special proceeding, and which may be of a perishable nature or likely to be injured from keeping."

There are two phases of this section which should be very carefully considered. The first is that it relates to the sale of property which is either "of a perishable nature," or "likely to be injured from keeping." This clearly covers such articles as fruit and vegetables and probably all food stuffs as well. On the other hand, it may be said that there is hardly

any class of personal property which is not to a certain degree likely to be injured from keeping. In this connection, I was asked a question by one of my students last fall as to whether, under Section 980, the court would have authority to order the sale of a fur coat which was in storage and which was the subject of an action, it appearing that the season for fur coats was then at its height and that the action could not be determined until the end of the winter. Here we find a case where, as a physical matter, the property is not in any sense likely to be injured from keeping, but the result to the owner thereof in the loss of an active market might well be just as serious as physical deterioration in the article itself. As I interpret the words "likely to be injured from keeping," the Legislature did not intend to have the section applied to a case where the only injury was the loss of the market value of the article, as in the fur coat case. It seems to me that the language is intended to apply to cases where the goods may not be what one would call "perishable," but where the storage for any considerable period would bring about a distinct physical deterioration in the article itself.

The other point concerning this section which I wish to discuss, is that it is applicable only to the sale of goods, wares or merchandise "which are the subject of" an action or special proceeding. These words have been used so many times in the past in connection with joinder of parties, joinder of causes and other matters and the courts have given such varied and sometimes inconsistent interpretations of the phrase that it is difficult to tell in advance just how this particular section will be construed in this respect. Apparently the application of Section 980 is not in any sense restricted

to replevin actions as there is a special provision in Section 1101a of the Civil Practice Act concerning the sale of perishable goods and animals which have been replevied. On the other hand, the language of Section 1101a is not nearly as extensive as the language of Section 980.

Enforcement of foreign decree of divorce or separation.

Sections 1171 and 1172, both of which were amended by the Legislature in 1921, make it possible to enforce a foreign decree of divorce or separation by the normal proceedings to be used for the enforcement of a domestic decree of a similar nature. The changes contained in these sections are really not strictly new to the Civil Practice Act as the most important thereof was originally made as an amendment to Code Section 1773 by Chapter 216 of the Laws of 1920.

There is, however, an important limitation contained in Section 1171 which should not be forgotten, namely, that the remedies available for the enforcement of a foreign decree of divorce or separation may only be used in this state, where the foreign decree of divorce is granted upon the ground of adultery or where the decree of separation is made upon the basis of one of the grounds for such decree available in this state. This limitation plainly appears on the face of Section 1171 and has been recently discussed by Mr. Justice Wagner at Special Term, Part I, of the Supreme Court, New York County, in *Eisenberg v. Eisenberg* (N. Y. L. J., May 19, 1922).

Service of Interlocutory Papers.

The provisions with reference to the service of interlocutory papers have been taken from the body of the

statute and are now included in the rules as Rules 20 and 21. There are two very important changes.

Under the Code, it will be recalled that service of an interlocutory paper at the office of the attorney when such attorney's office was closed, could be made by placing the paper, inclosed in a sealed wrapper directed to the attorney, in the attorney's letter box. In New York City and probably in many other parts of the state it is a very customary thing for the attorneys to have attached to the doors of their offices a slit or opening sometimes marked with the word "letters" and at other times not marked at all. It was quite unusual, however, to have any letter box placed behind the slit in the door so that letters or other documents dropped through the opening simply fall upon the floor. It was repeatedly held under the Code that service by dropping a paper through such a slit or opening was not a valid service because not made in the "letter box" of the attorney. This rule has been changed and it is now provided in Rule 20, subdivision 3, that service may be made by depositing the paper in the office *"letter-drop"* or "letter box." It is important to remember that proper service cannot even now be made by simply taking a paper, such as a notice of motion and annexed affidavits, for example, and pushing it through the slit in the door. It must now as formerly be inclosed in a sealed wrapper directed to the attorney.

The other change relates to the service of interlocutory papers upon an attorney by mail. Under the Code, one of the regular methods of service upon an attorney was by leaving the paper at his residence within the state, with a person of suitable age and discretion, between the hours of 6 o'clock in the morning and 9 o'clock in the evening, where there was no person in

charge of the attorney's office. This made no provision for the case where the attorney was a non-resident of the state and the discrepancy was important, in view of the fact that a great many lawyers who practice in New York City reside in either New Jersey or Connecticut. This matter is now taken care of by subdivision 4 of Rule 20 which provides:

"If, under the rules, a paper may be served at the residence of an attorney living in the state, service may be made on an attorney practicing in the state but residing outside thereof, by depositing the paper in a post-office or in any postoffice box regularly maintained by the government of the United States in the city, village or town where his office is located, properly inclosed in a postpaid wrapper directed to him at his office. A service made as provided in this subdivision is equivalent to personal service on him."

Before leaving this subject, I wish to call your attention to the fact that there is no real uniformity in the present practice with reference to mailing of papers, both jurisdictional and interlocutory. In Rule 20, with reference to several of the various subdivisions contained therein, the expression "in a post-office or in any post-office box" is used. In Rule 53 with reference to proof of service of the summons, subdivision 8 mentions the deposit of a summons "in a post-office." Rule 50 with reference to the order for service of a summons by publication directs that the order must contain a direction for the deposit of the papers "in a post-office or in any post-office box." Section 231 as to substituted service, provides for the deposit "in a post-office." On the other hand, Section 154 which relates to service of papers generally through the postoffice has now made applicable generally throughout the state the following provision, which under the Code, applied to New York City only, "deposit in a branch

postoffice is equivalent to deposit in a general post-office."

There appears to be no serious difficulty about the matter, and I merely wish to make the point that it is important to consult the specific provisions applicable to the particular matter under consideration so that the the service may be properly made. I do think, however, that it would be an easy matter to have the rules and the statute as well so amended as to provide a single rule applicable generally to the matter of service of papers by mail; and I may say that I know of no reason why a general provision might not be adopted applicable to jurisdictional and interlocutory papers as well, which should provide for the deposit of the papers properly inclosed in a postpaid wrapper in any postoffice, branch postoffice, postoffice station, letter box, mail chute or other receptacle provided for the purpose and regularly maintained by the Government of the United States.

Court and Judges' Orders.

The distinction between court orders and judges' orders has always been a source of trial and tribulation to attorneys and court clerks. The distinction, however, is one of importance as court orders must be entered and filed, whereas judges' orders are normally returned to the attorneys who submit them for signature. Furthermore, when considered in connection with the various specific instances where one form or the other is required, it is quite apparent that it is not feasible, nor in any sense convenient, to attempt to abolish the distinction between these two forms of orders. On the other hand, there have been a number

of decisions in the past which imposed far too harsh a penalty because of the use of the wrong form. In many instances whole proceedings were vacated because of a mistake in this respect.

Accordingly, without in any sense attempting to abolish the distinction between court orders on the one hand and judges' orders on the other, the Civil Practice Act very wisely provides as follows,

"Sec. 129. An order made by a justice of the supreme court, out of court, shall not be void on the ground that a statute or rule, in terms or in effect, requires the motion therefor to be made to, or authorizes the order to be made only by, such court, unless the order be made outside of a county or judicial district in which an application to the court for such order is authorized."

There has been some general talk since the Practice Act went into effect which would indicate a disposition on the part of many lawyers to treat this section as in effect abolishing the distinction between court orders and judges' orders. It does no such thing; and it is just as important today as it ever was to submit the proper form of order for signature. Suppose, for instance that an order of discontinuance is submitted to the clerk at Special Term, Part II, in the form of a judge's order. Plainly, Section 129 gives no authority to the clerk to place his approval upon such a form of order and to submit it to the judge sitting at that Part for signature.

All that Section 129 purports to do is to cover those cases where by mistake or inadvertence the wrong form of order has been signed; then in that event, the statute directs that the order shall not be void, merely because the wrong form of order has been used. Furthermore, the section is in terms restricted to the Supreme Court.

Revival Proceedings.

One of the great difficulties in the past in the case of the death of one or more of the parties to an action arose in connection with the service of the necessary motion papers on the motion to revive and continue the action. It was for this reason that the Code sections provided for the revival and continuance of such actions either by motion or by the issuance of a supplemental summons and a supplemental complaint. As there was no provision in the Code for the service of motion papers outside of the state, then in the event that the executor or administrator of the deceased party happened to be a non-resident, the method of supplemental summons and complaint became impera tive, as there were provisions in the Code with reference to the service of a summons by publication.

Generally speaking, the provisions of the Practice Act with reference to the revival and continuance of actions, where one or more parties thereto have died, do not involve any substantial change from the practice as it existed under the Code; and we still find a reference to a supplemental summons and to supplemental pleadings in Section 87 of the Civil Practice Act.

Section 90a, however, is a new provision which was added to the Code by Chapter 481 of the Laws of 1920 and which was embodied in the Civil Practice Act by the Legislature in 1921. That section provides generally that the service of notices in connection with the revival of an action or proceeding may be made by such method and in such manner as the court or judge shall direct. The application of this new section will, of course, depend upon the facts of the various cases as they arise. It may be said, however, that most

instances will be such as to make it possible for the court to direct the service of the papers by mail or otherwise under Section 90a and to thus dispense with the more cumbersome and expensive method involved in the issuance of a supplemental summons.

LECTURE VII.

Compulsory Admissions.

There are two sections of the Civil Practice Act covering the general subject of compulsory admissions, one of which was in the Code for a great many years and in fact originally came from the Code of Procedure, and the other is entirely new and is taken from the English Practice Act.

The section which existed all along under the Code is Section 322 which provides as follows:

> "The attorney for a party, at any time before the trial, may exhibit to the attorney for the adverse party, a paper material to the action and request a written admission of its genuineness. If the admission is not given within four days after the request, and the paper is proved or admitted on the trial, the expenses incurred by the party exhibiting it in order to prove its genuineness must be ascertained at the trial and paid by the party refusing the admission, whatever the result of the cause, matter or issue may be; unless it appears to the satisfaction of the court that there was a good reason for the refusal."

I am discussing this section, because it is a curious fact that although in the Code for all these years it was used very little by lawyers generally and indeed I do not doubt that large numbers of lawyers throughout the state did not even know the section existed. What is the reason why this section proved of so little practical value? The reason, I take it, is that the only penalty imposed upon a party who failed to give upon request a written admission of the genuineness of a paper was that the expense incurred by the party exhibiting the paper had to be ascertained at the trial and paid by the party refusing the admission. One

may well imagine the reluctance of any attorney to complicate the trial of a case on the merits with incidental proof of the expense incurred in proving the genuineness of a certain paper; and it was probably found that there was too much red tape involved to make the section of practical value. Furthermore, the court might always find that there was some good reason for the refusal to make the requested admission and thus relieve the party who refused the admission from any obligation to pay the expense involved.

This section seems to me to be one which, while not of great value, for the purpose intended, may even be used for ulterior purposes in order to confuse the jury and divert their attention from the really fundamental issues of the case. In other words, a lawyer with a difficult or desperate case might well request his adversary to admit the genuineness of several documents about which his adversary knew little or nothing, for the sole purpose of making a great fuss about the matter at the trial proving the circumstances and the expense involved, in the hope that the jury becoming incensed at the failure of the adversary to admit the genuineness of the documents might be induced to render a favorable verdict.

There appears to be no reason whatsoever why this particular remedy of a compulsory admission with reference to the genuineness of a document could not be made really useful and practical; and I think this could be done by changing the penalty involved and making it possible, after the trial, to impose the expense of proving the genuineness of the documents upon the delinquent party by an ordinary motion. This would do away with the old system which does not seem to be practicable or workable.

This same criticism is apparently applicable to the new section with reference to the compulsory admission of facts. Section 323 provides,

"Any party, by notice in writing, at any time not later than ten days before the term or day for which notice of trial has been given, may call on any other party to admit, for the purposes of the cause, matter or issue only, any specific fact or facts mentioned in such notice. In case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the court or a judge, the expenses incurred in proving such fact or facts must be ascertained at the trial and paid by the party so neglecting or refusing, whatever the result of the cause, matter or issue may be, unless at the trial or hearing the court or a judge certify that the refusal to admit was reasonable, or unless the court or a judge, at any time, shall order or direct otherwise. Any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular cause, matter or issue, and not as an admission to be used against the party on any other occasion or in favor of any person other than the party giving the notice. The court or a judge, at any time, may allow any party to amend or withdraw any admission so made on such terms as may be just."

Certainly this is a remedy which if practicable and workable is of the utmost importance to all litigants. There are certain fundamental difficulties, however, which are well illustrated by a recent decision by Mr. Justice Cohalan at Special Term, Part I, of the Supreme Court, New York County, in the case of *Koppel Industrial Car & Equipment Co. v. Portalis & Co., Ltd.* (N. Y. L. J., May 20, 1922). In that case the defendant served a notice and demand pursuant to Section 323 of the Civil Practice Act which covered 115 folios and contained 226 separately numbered paragraphs. If the plaintiff had complied with the notice and admitted the facts therein purported to be set forth, it could only have done so after a most exhaustive investigation and the incurring of considerable expense, and the whole demand was so lengthy and

generally unreasonable as to put Section 323 to the acid test. As far as the language of Section 323 was concerned the defendant was within his rights in serving a demand containing so many separate paragraphs and covering practically the entire case. On the other hand only the clearest sort of legislative mandate would justify the court in sustaining such an unreasonable demand as was made in this case. The motion made by the plaintiff was to strike out the notice and demand as unauthorized and in granting the motion in part and denying it in part, Mr. Justice Cohalan laid down certain rules which, if adopted by the appellate courts, will go far to clarify, and to properly clarify, Section 323. The motion was granted insofar as the notice and demand included facts falling in any one of the following classes: (a) facts, the truth or falsity of which could not be ascertained by the person upon whom the notice was served without great trouble and expense; (b) facts resting upon purely opinion evidence; (c) facts, the evidence of which would be inadmissible at the trial; (d) facts which standing alone might have, to the court or jury, an entirely different meaning than if the whole fact were presented, which the court characterized as "half a fact."

Of course, the plaintiff in the *Koppel Industrial Car & Equipment Co.* case was not in any sense required to make a motion to strike out the notice and demand. He could have simply refused to comply with the demand and have taken his chances on the matter at the trial, where the court would certainly have certified that the refusal to admit was reasonable.

Discovery and Inspection.

With respect to discovery and inspection the provisions of the Code are substantially repeated in Sections 324, 325 and 326 of the Civil Practice Act, supplemented by Rules 140, 141 and 142. The normal procedure will thus be to obtain an order to show cause directing that the adverse party produce and discover a particular book, document, paper, machine or other article involved, or show cause why he should not be compelled to produce and discover the same. On the return day the matter will be argued out just as was done under the Code and an order made directing such discovery or inspection as the facts may warrant and specifying the time, place and manner in which the discovery and inspection is to be made. There is a provision in Rule 142 which seems to be a very good one, to the effect that if discovery or inspection be directed, a referee may be appointed by the order to direct or superintend it, whose certificate, unless set aside by the court is presumptive, and except in proceedings for contempt, conclusive evidence of compliance or non-compliance with the terms of the order. This will eliminate many of the irritating questions which have arisen in the past as to whether a proper discovery and inspection have been permitted. (See *Langfelder v. Levy,* Special Term, Part I, New York City Court, Schmuck, J., N. Y. L. J., May 17, 1922).

It is important to note and you will no doubt remember that the Code provisions as to discovery and inspection which have been thus repeated in the Civil Practice Act do not merely cover books, papers and documents, but relate generally to "any article or property" in the possession of the adverse party re-

lating to the merits of the action or of the defense therein. I remember a case in which, pursuant to this section of the Code (now Section 324 of the Civil Practice Act), I obtained the discovery and inspection of one of the buses of the Fifth Avenue Coach Company which had been involved in a certain accident and upon this discovery and inspection certain measurements and photographs were taken.

There are, however, two new provisions in the Civil Practice Act on the subject of discovery and inspection. These are both taken from the English Practice Act and seem of great practical value. They are as follows:

"Sec. 327. Every party to an action shall be entitled, at any time, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his attorney, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterward be at liberty to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the court that such document relates only to his own title, he being a defendant, or that he had some other cause or excuse which the court shall deem sufficient for not complying with such notice; in which case the court may allow the same to be put in evidence on such terms as to costs and otherwise as the court shall think fit."

"Sec. 328. The court, on the application of any party to an action, also may make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been in his possession or power, and, if not then in his possession, when he parted with the same, and what has become thereof. Such application shall be made upon an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the case or matter, or to some of them."

The penalty prescribed in Section 327 is thus that

the party refusing to produce the document for inspection upon notice shall not be at liberty to put the documents in evidence at the trial. This penalty is one which has been in force for a great many years in those instances where a party during the course of a trial refuses or neglects to produce the paper upon request; then such party is prevented from later placing the original in evidence at that trial. It would seem as though the penalty thus prescribed is simple, easily applied and entirely practicable.

It has been suggested that perhaps this penalty provided in Section 327 is not automatic but that a separate motion should be made in advance of the trial to preclude the delinquent party from putting the paper or document in evidence at the trial, upon the analogy to a similar motion where a party has refused or neglected to comply with an order directing him to give a bill of particulars. While this interpretation is possible, such does not seem to be the English practice, and I can think of no real reason why in construing Section 327 the courts should not determine that the penalty is automatically imposed. If the Civil Practice Act is for the purpose of simplifying and liberalizing the procedure, there would appear to be no good reason for adopting a construction of this section which only serves to complicate the procedure and multiply the number of motions and applications to be made.

With respect to Section 328, I should think the provisions of this section so important as to justify the formulation of a rule in every up-to-date law office, requiring the managing clerk to check over each paper served upon the office and make a memorandum of the specific documents referred to therein whether copies

of the same actually appear or not, so that a report may be made to the member of the firm in charge of the case and he be thus reminded that under Section 328 an application may be made to require the other side to state the facts specified in Section 328 with reference to the particular document or documents. Unless some such office rule is regularly formulated the chances are that Section 328 will be rarely used; and if lawyers acquire the habit of checking all such matters up as a matter of course, it is very probable that the result will be a more careful preparation of motion papers generally than now seems to be the case.

Cancellation of Lis Pendens.

Section 124 with reference to the cancellation of a lis pendens in actions other than to foreclose a mortgage or for partition of real property or for dower where it shall appear to the court that adequate relief can be secured to the party filing the same by a deposit of money, or in the discretion of the court by the giving of an undertaking, is new, but is substantially taken from former Section 1671 of the Code.

Appellate Practice.

There have been a considerable number of very important changes in connection with appellate practice which, while not in any sense very radical, relate to matters which are constantly arising in every day practice.

The first of these provisions is contained in Section 620 to the effect that an order of the Appellate Division in reversing a judgment or order of the lower court shall state whether the reversal was made upon the facts or upon the law, or upon both the law and

the facts. I need not tell you that the grounds of reversal in the Appellate Division are vital in connection with the jurisdiction of the Court of Appeals, which is restricted to matters of law and which with certain well defined exceptions, such as the right to review the facts on an appeal from a judgment in a murder case, does not extend to matters of fact. It is in connection with the possibility of an appeal to the Court of Appeals that Section 620 of the Civil Practice Act now requires the order of the Appellate Division to be very plain and clear on this point.

Under the Code Practice there was no specific provision of law making it imperative for the Appellate Division to specify whether its reversal was on the facts or on the law; sometimes the order contained such a specification and in other instances it did not, with the result in those cases where no specification was made of producing considerable uncertainty and a good deal of embarrassment and difficulty in connection with the presentation of the case before the Court of Appeals. Even the rule which the Court of Appeals finally adopted by decision, to the effect that where the order was silent it would be assumed that the reversal was on questions of law, was not in any sense adequate as the same fundamental uncertainty existed, which the Appellate Division could have cleared up in each specific case had it taken the trouble to do so.

To take a concrete illustration, let us suppose that under the Code practice there is a judgment for the plaintiff entered upon a verdict of the jury in a personal injury action, and upon appeal to the Appellate Division the appellant argues questions relating to the weight of evidence and also certain questions with reference to exceptions to the admission and rejection

of evidence and exceptions to the charge and to refusals to charge as requested. The Appellate Division reverses the judgment and orders a new trial. While the opinion discusses in detail errors committed by the trial court in its charge to the jury, the opinion also discusses briefly the weight of evidence; and let us further assume that the order of reversal does not in any way specify whether it was made upon the facts or upon the law. You may readily imagine the situation presented to the Court of Appeals in the event of an appeal to that court. On the one hand there is the opinion of the Appellate Division indicating very clearly that the reversal was partly upon the ground that the verdict was against the weight of evidence; on the other hand, in the absence of any specification, there is the assumption that the reversal was on questions of law which the Court of Appeals had the power to review. This uncertainty is now entirely removed by Section 620; and if by inadvertence the order of the Appellate Division in any particular case fails to specify whether the reversal is upon the facts or upon the law or upon both the law and the facts, a motion for a resettlement of the order will at once require the court to make the proper form of order.

There is another change which relates to appeals generally and which was a very necessary one. I refer to Sections 592, 612 and 625 which provide generally that when one side serves a copy of an order or judgment with notice of entry thereof, the effect is not merely to start the time within which his adversary may appeal running, but to also equally limit the time within which the party serving the copy of the order or judgment with notice of entry thereof may himself appeal.

While there was very little to be found in the cases on the subject under the Code, it was generally supposed that the time of one of the parties within which to appeal from an order or judgment could only be started to run by the service upon him of a copy of the order or judgment with notice of entry; and I recall several cases which were brought to my attention under the Code Practice where attorneys who wished to keep open their own time to appeal effected their purpose by promptly upon the decision of the matter serving upon their adversary a copy of the order or judgment with notice of entry, with the effect that the adversary having already been served with the copy of the order or judgment neglected to serve another copy upon his opponent. It requires no argument to demonstrate that such technical practice as this was most unfair and the provisions of the Civil Practice Act on this subject have brought about a much needed change.

There are several changes with reference to appeals to the Court of Appeals to which a brief reference should be made. Section 591 now provides that an application may be made to the Court of Appeals for permission to appeal to that court during a recess of the Court of Appeals, the motion papers to be served during the recess period, the motion to be returnable after the expiration thereof, it being required that the motion be noticed for a day not later than ten days after the Court of Appeals shall have reconvened. Section 591 goes on to provide that if the motion is granted then the party applying for such permission shall have thirty days from the granting thereof to perfect his appeal to the Court of Appeals.

Section 590 now contains a very desirable provision

to the effect that where the Appellate Division has passed upon a matter by interlocutory order or judgment which in effect has disposed of the entire controversy and merely left the formality of entering the final judgment in the court of original jurisdiction, that in such cases the Appellate Division having fully passed upon the matter the defeated party may appeal directly, from the final judgment rendered at Special Term or Trial Term or pursuant to the directions contained in a referee's report, to the Court of Appeals. Section 590 goes on to provide that such appeals bring up for review only the determination of the Appellate Division, but this is entirely adequate as in such cases it is the determination of the Appellate Division which the appellant really seeks to review.

To make this matter entirely clear I may say that it very frequently happened under the Code that a defeated litigant would appeal to the Appellate Division and the decision of the Appellate Division would entirely cover the fundamental questions of law involved, but because of some technical requirement the order of the Appellate Division would direct some further action on the part of the successful litigant, such as the entry of a final judgment or the conduct of some further proceedings of a purely formal nature. Under the Code, it was necessary, in spite of the fact that the Appellate Division had already fully passed upon the matter, to appeal from the final judgment of the Special Term or Trial Term to the Appellate Division, which would affirm the judgment as a matter of course, and then only could the appeal be made to the Court of Appeals. This system under the Code was unduly prolonged, involved the payment of additional costs on the pro forma affirmance in the

Appellate Division, and was plainly unnecessary. The new provision of Section 590 properly permits the direct appeal to the Court of Appeals from the final judgment of the Special or Trial Term.

Section 593 of the Civil Practice Act was amended in 1921 by adding the following sentence, which is self explanatory,

"Provided, however, that no security shall be necessary to perfect such an appeal, where the appellate division or a judge of the court of appeals shall certify that a constitutional question is involved; nor by a claimant under the workmen's compensation law where the decision of the appellate division is not unanimous, nor where the decision of the appellate division is unanimous and such appeal is with the consent of the appellate division, or a judge of the court of appeals."

LECTURE VIII.

State Writs Abolished.

With the exception of habeas corpus and certiorari to inquire into the cause of detention, the state writs have been abolished by the Civil Practice Act. The former writ of certiorari to review the determination of an inferior tribunal, the alternative and peremptory writs of mandamus, and the writ of prohibition, while abolished (Sections 1283, 1313, 1341) have been retained in the form of what is now known as a certiorari order (Section 1284), mandamus orders (Section 1314), and a prohibition order (Section 1342). The old writ for the assessment of damages having long been practically a dead letter in the law is now entirely gone. The reason why the writ of habeas corpus and the writ of certiorari to inquire into the cause of detention have been preserved is that it was feared lest even though preserved in substance, some question of the constitutionality of the new provisions might be raised.

As I have been repeatedly asked for an explanation of why it is necessary to have both a writ of habeas corpus and a writ of certiorari to inquire into the cause of detention, I may say that the reason is that the writ of certiorari to inquire into the cause of detention is particularly applicable where a person has been detained pursuant to the order of some judicial or quasi-judicial tribunal from which no right of appeal would lie and where, in order to properly pass upon the legality of the detention, a return of the proceedings before the inferior tribunal is required. Where, on the other hand, there are no such judicial proceedings, the

ordinary writ of habeas corpus is adequate to cover the case. It is not an uncommon experience to have an application which shall combine the writ of habeas corpus and a writ of certiorari to inquire into the cause of detention. This was well illustrated in the recent *Semenoff* case (*People ex rel. Semenoff v. Nagle,* — App. Div. —), where the proceeding came on for hearing at Special Term, Part II, of the Supreme Court, New York County, on the return of a writ of certiorari to inquire into the cause of detention pursuant to Section 1230 of the Civil Practice Act.

With respect to the writs of certiorari to inquire into the cause of detention, and habeas corpus, the practice has been retained in exactly the same form as it existed under the Code.

As to the other proceedings formerly taken by state writ, the present practice is to apply for an order in the first instance, a certified copy of which is served upon the defendant or respondent, and the proceedings thereafter follow substantially the practice prescribed by the Code. Thus Section 1283 of the Civil Practice Act provides for the issuance of a certiorari order in certain instances, Section 1294 provides for the service of the order, Sections 1296 and 1297 provide in detail as to when and where the order is returnable and how the return of the respondent shall be made and Section 1300 provides that after the return is complete, either party may notice it for hearing at any time and the matter be thus disposed of in due course.

There is a further point as to certiorari, however, which it is important to remember. Section 1283 by no means purports to abolish all writs of certiorari provided by any statute prior to October 1, 1921, but only the writ of certiorari "under the provisions of the

Code of Civil Procedure." This is the purport of Section 1283 as a whole. The result is that other certiorari proceedings pursuant to other statutes such as the Tax Law are not governed by the Civil Practice Act but by the special statute in which such proceedings are described. The question has arisen repeatedly in reference to certiorari proceedings to review tax assessments since October 1, 1921, and so far as I have been able to ascertain the courts have uniformly ruled that the proper practice in such cases is to proceed by the ordinary form of writ of certiorari and not by a certiorari order as provided in the Civil Practice Act.

With reference to mandamus, mandamus orders are classified as either alternative or peremptory (Section 1314) and the alternative form of order is granted upon a petition as provided in Section 1315, which requires previous notice of the application for the order to be given to the body, officer or person against which or whom the order is sought. These orders are granted only at a Special Term of the Supreme Court, except where granted by the Appellate Division pursuant to the terms of Section 1318; and where the applicant's right to the mandamus order depends only upon questions of law, a peremptory order may be granted in the first instance (Section 1319). The normal practice will still be to apply originally for the alternative order changing the same to a peremptory order if it shall appear that the respondent does not contest any of the matters of fact alleged in the petition.

The provisions as to the form and contents of the return, the issues of fact raised by the return and the trial thereof, are identical with the similar provisions contained in the Code and would not seem to require any special treatment at this time.

Provisional Remedies.

The changes in reference to provisional remedies fall into two classes: first, a partial consolidation of the provisions relating to arrest, injunction and attachment, so as to make the practice in obtaining any one of these provisional remedies as near as may be identical with the practice in obtaining the others; and second, a large number of changes in detail with reference to each of the provisional remedies partly for the purpose of clarification and partly for the purpose of changing the law. All of these changes must be examined with care.

Sections 814 to 825 of the Civil Practice Act are characterized as general provisions applicable to arrest, injunction and attachment; and in many respects these general provisions place each of these remedies upon the same basis. Thus Section 814 classifies the order of arrest, the warrant of attachment, and the order for a temporary injunction together, and Section 815 provides that an application for such an order or warrant may be made without notice. Then Section 816 provides generally with reference to the proof necessary to be shown in order to obtain any one of these provisional remedies, thus consolidating in a single section provisions which had been split up into several different titles of the Code of Civil Procedure. Section 816 is as follows:

"Proof of a sufficient cause of action or fact in support thereof or of any extrinsic fact, to entitle a party to such an order or warrant, or proof to support or oppose a motion to vacate the order or warrant or discharge a person from arrest, or discharge an attachment, may be made by affidavit and by such other written evidence as the rules permit."

Probably the only portion of this section which may in any sense be regarded as substantially changing the

practice is the last clause which permits the proof to be made "by such other written evidence as the rules permit." It is a significant fact that the Rules of Civil Practice as now formulated contain no provision whatever to supplement this clause of Section 816. Rules 80 to 84 inclusive are the only rules of Civil Practice on the subject and they do not in any sense purport to modify the procedure followed under the Code with respect to the proof to be submitted in support of an application for a provisional remedy.

No doubt the Legislature intended by Section 816 to give the courts and the Convention for the Formulation of the Rules of Civil Practice very broad powers so as to, if necessary, further simplify the practice in connection with obtaining provisional remedies. On the other hand, the practice followed under the Code was apparently entirely adequate and did not seem to require any simplification or broadening in this respect. While there was no specific provision in the Code on the matter, there are a great many decisions which divide the proof to be submitted on an application for the issuance of a provisional remedy into two classes, namely, statements made on personal knowledge and statements made on information and belief. With reference to statements contained in affidavits purporting to be made upon personal knowledge, the courts very naturally required some showing of facts which would indicate that the affiant really had personal knowledge of the facts to which his affidavit related (*Hoormann v. Climax Cycle Co.*, 9 App. Div. 579; *Price v. Levy*, 93 App. Div. 274). This rule was interpreted with great liberality and where the affiant appeared to be personally connected with the transaction to which his affidavit related, a bare statement

without any qualification was assumed to be made on personal knowledge and was given due credence. I remember one case (*King v. King,* 59 App. Div. 128), where the mere fact that the plaintiff, who was suing as an assignee of a part of a claim, was shown to be one of the beneficiaries under the will of the testator to whom the claim originally belonged, was deemed sufficient as the court said to give "authenticity to her sworn statements which would not apply to a stranger purchasing a cause of action and whose rights and knowledge thereof would necessarily be inferior." As to statements made on information and belief, the practice under the Code was equally liberal and seems to extend to a point beyond which it would not be safe to go. It was in no sense necessary to have all affidavits made by persons who had personal knowledge of the facts or who could give competent testimony at the trial with respect to the matters set forth in their affidavits. The rule which has been repeatedly asserted by the courts under the Code is as follows, as stated by the Court of Appeals in *Buell v. Van Camp,* 119 N. Y. 160:

"Hearsay evidence is generally excluded upon the trial of issues of fact in actions. As a rule, it is not good common law evidence. But in collateral proceedings or matters of practice, where orders in the progress of actions are applied for, judges frequently act upon facts stated upon information and belief. In such proceedings absolute certainty is not expected; the evidence is sufficient if convincing and satisfactory, is usually by affidavit, *ex parte,* and is not subjected to the test of cross-examination. All that is required is that the information furnished by the affidavit shall be such that a person of reasonable prudence would be willing to accept and act upon it."

In the *Buell* case the affidavits relied upon in support of the attachment consisted of copies of affidavits which were submitted with an explanation of the

reason why the original affiants could not be found to make new affidavits.

In view of these decisions it would not seem necessary for the Civil Practice Act or the Rules of Civil Practice to permit the use upon the application for a provisional remedy of any "other written evidence" than was permitted by the decisions construing the Code.

Section 817 also consolidates a number of provisions formerly contained in several different sections of the Code and in addition this section contains new matter of considerable importance. It is as follows:

"Except as otherwise specially prescribed by statute, or rules adopted as provided in this section, any such order or warrant may be granted, in a proper case, either by the court in which the action is brought or a judge thereof or any county judge; but the rules may provide, either generally or as to any department, that an application for a warrant of attachment or for an order for the arrest of a party, other than an order which by express provisions of statute may be granted only by the court, shall be made to such a judge and not to the court."

It will thus be observed that an order of arrest or an injunction order or a warrant of attachment may be granted either by the court in which the action is brought or by a judge thereof or by any county judge except as otherwise specially prescribed by statute; and one of such special provisions is contained in Section 827 with reference to an order of arrest in an equity case which can still only be granted "by the court." The last portion of the section is permissive only and gives the judges power to adopt rules requiring applications for an attachment or arrest to be made to a judge only and not to the court, in any department. Such a rule would apply to the application and would authorize the court to decline to hear

the application. The present Rules of Civil Practice do not touch upon this matter at all; nor, as far as I am aware, have any special rules been adopted in any judicial department of the state to exercise the authority granted by Section 817.

Only one of the remaining sections contained in the preliminary general provisions at the beginning of Article 46 of the Civil Practice Act appears to require any extended discussion. Section 821 merely repeats the general requirement that the order or warrant must briefly recite the ground or grounds on which it is granted; Section 823 prescribes the instances in which these provisional remedies may not be granted together; Section 824 merely contains the general provision that these remedies are available to a defendant in connection with a counterclaim, and Section 825 now contains the general provision formerly placed together with the provisions governing the form of the summons, to the effect that the court upon the granting of a provisional remedy, acquires a conditional jurisdiction which entirely fails, unless properly followed up as required by law.

The remaining section, which I think requires considerable discussion, is Section 822 relating to new proof to sustain an order or warrant upon the hearing of a motion to vacate. This is a question of great practical importance and is not made quite as clear in the Civil Practice Act as might have been desired.

Perhaps it might be well for me to first briefly refer to the practice under the Code in this respect and then discuss Section 822. Prior to 1911, if a motion were made to vacate a warrant of attachment, an order of arrest or injunction order and this motion were based either upon a failure of proof or upon a defective

complaint, where a complaint was required, the court had no option in the matter but was required to grant the motion to vacate even though it clearly appeared that the defect or omission could easily be supplied or remedied. With respect to defects of a purely formal nature, Section 723 of the Code gave the courts the limited power to permit an amendment of such matters even prior to 1911. The result was that in almost every case of the granting of a provisional remedy, an application would be made on behalf of the defendant to vacate the order or warrant upon some technical ground; and, as applications for such provisional remedies are usually made in great haste, astute lawyers were always able to find some ground or other upon which to base a motion to vacate. After the provisional remedy was thus set aside, two unfortunate results ensued: first, a liability was automatically established under the bond filed by the plaintiff; and second, the defendant was given an opportunity to get himself or his property beyond the jurisdiction and thus make it impossible for the courts to afford the plaintiff any relief by the issuance of a new order or warrant, upon proper papers.

Accordingly in 1911, the Legislature amended Section 768 of the Code which related generally to motion practice by adding the following sentence:

"Whenever a motion is made to set aside or vacate an order, judgment or decree or any paper filed or proceeding taken, because of technical defects therein, or because of defects or insufficiencies in the papers or proceedings upon which it was made or entered and such defects or insufficiencies can, without prejudice to intervening rights, be cured or supplied, it shall be the duty of the court to direct upon the hearing of such motion, that such defects or insufficiencies in the order, judgment or decree, or in the papers or proceedings, be cured or supplied nunc pro tunc, awarding against the party in whose order, judgment or decree, or in

whose papers or proceedings such defects or insufficiencies appear, costs in favor of the adverse party."

While not specifically so stated, it was very clear that the Legislature thus intended to remedy the situation which theretofore existed in connection with motions to vacate provisional remedies. Unfortunately, however, Section 768 as amended made no reference whatever to provisional remedies nor was any amendment made to the sections relating to arrest, attachment and injunction so as to clearly indicate that the new practice was intended to in a sense modify directly and fundamentally the provisions of law concerning provisional remedies generally. The point was of importance because upon the granting of a provisional remedy under the Code, the court acquired a purely conditional jurisdiction; and if the plaintiff failed to show the necessary facts and conditions required by the various provisions of the Code applicable to arrest, attachment and injunction, a very forceful argument could be made to the effect that the court entirely lacked jurisdiction in connection with the particular provisional remedy which had been granted, and it was accordingly argued that in spite of the new portion of Section 768 added in 1911, the courts were without the power to adjourn a motion to vacate and permit the plaintiff to supply the defects or insufficiencies in his papers. While this argument was a very forceful one, the courts, no doubt largely influenced by the equities of the situation and the questions of policy involved, have held that upon the making of a motion to vacate an order of arrest, an injunction order, or a warrant of attachment, the justices at Special Term had power to permit an amendment of the papers where the defect was of a formal nature or

to adjourn the motion and permit the plaintiff to supply the defects and insufficiencies by filing new papers and affidavits as the circumstances might require (*Cutler v. Allavena,* 165 App. Div. 422; *Manhattan Commercial Co. v. Leuchtenberg Co.,* 77 Misc. 565). The Court of Appeals never passed upon the point, however, and a number of thoughtful practitioners felt that if the question ever did get to the Court of Appeals, there was grave danger lest the decision of the Appellate Division in the *Cutler* case be overruled. Furthermore, the courts uniformly held in construing Section 768 of the Code that the defects or insufficiencies in the papers or proceedings therein referred to did not include a defective complaint; and it was held that if the complaint failed to state facts sufficient to constitute a cause of action, or a proper cause of action in connection with one of the provisional remedies in question, and the complaint was required by law, then the motion to vacate would have to be granted, as permission to serve an amended complaint could only be granted to the plaintiff upon the making of a special separate motion therefor at Special Term (*Reinboth v. Ederheimer,* 134 N. Y. Supp. 16).

We thus find that defects and insufficiencies or mistakes, defects, omissions and irregularities in provisional remedy papers, naturally fall into three classes: (1) defects of a formal nature such as the omission to state in the order the ground of arrest, attachment or injunction as required by Section 821 of the Civil Practice Act; (2) omissions of necessary evidentiary matter in the affidavits or the defective showing of evidentiary matter; and (3) the use of a complaint which is defective either because it entirely fails to state facts sufficient to constitute a cause of action,

or which is defective because it does not state the kind of a cause of action required by the sections of the law applicable to the particular provisional remedy in question. To develop the problem a bit further, it is important to bear in mind that in some instances a complaint is required, as where an order of arrest is obtained under subdivisions 7, 8, or 10 of Section 826 of the Civil Practice Act or Section 827 of the Civil Practice Act, or where an injunction is obtained under Section 877, when the right thereto depends upon the nature of the action; in other cases the inclusion of a complaint is unnecessary and it may be regarded as surplusage. To make this point clear you will observe that a complaint is required under subdivisions 7, 8, and 10 of Section 826, because in each of those subdivisions the words "where it is alleged in the complaint" are to be found. A similar provision is contained in Section 877 as to the granting of an injunction pendente lite, when the right thereto depends upon the nature of the action as such section provides, "where it appears from the complaint that the plaintiff demands and is entitled to a judgment against the defendant restraining the commission or continuance of an act." The argument in connection with Section 827 is based upon the phrase "defendant may also be arrested in an action *wherein the judgment demanded* requires the performance of an act." Without a complaint, it has been held that it is impossible to know with certainty what the "judgment demanded" is (*Lichstrahl v. Lichstrahl,* 38 Misc. 331).

I may say in passing, that there was considerable doubt under the Code as to when a complaint was necessary and when it was not in connection with the

various provisional remedies and the law was to an extent in a state of uncertainty. Even in the instance where a specific subdivision of the arrest sections contained the provision "where it appears in the complaint" there were decisions holding that the complaint was not necessary (*Vandeweghe v. Schwartz,* 187 App. Div. 219; *contra, Engelhardt Co. v. Benjamin,* 2 App. Div. 91). As to attachments it seems very plain that a complaint is not required.

Returning now to the main problem, the question is, how is the plaintiff to overcome defects of the three classes above mentioned under the Civil Practice Act. By tracing down Section 768 of the Code we find that it is now supplanted by Section 105, according to the footnote of the Committee and Section 105, as you will recall, provides generally, that at any stage of an action a mistake, omission, irregularity or defect may be corrected or supplied in the discretion of the court, and it is further provided that if the mistake, omission, irregularity or defect does not affect a substantial right of any party, then such mistake, omission, irregularity or defect must be disregarded. If this Section 105 stood alone the situation would seem to be very simple as that section is not restricted to any particular phase or proceeding in an action and would seem just as applicable in connection with a motion to vacate a provisional remedy as in connection with any other application to vacate an order or otherwise. If Section 105 stood alone, I should be clearly of the opinion that the courts under the Civil Practice Act had ample power to either disregard the defect, which would no doubt be the proper practice where the defect is of a formal nature as above described, or to permit the defect or omission to

be supplied in a proper case, whether it related to evidentiary matter or to a defective complaint. The problem is complicated, however, in connection with the provisional remedies by Section 822 and also by any other section, to which I shall refer in a moment. Section 822 provides as follows:

"If the application to vacate be without notice, it shall be founded and heard only on the papers on which the order or warrant was granted. If the application to vacate be to the court or a judge thereof, upon notice, the provisions of this act shall not prevent the court or judge, in furtherance of justice, from allowing new proof, in behalf of the party opposing the application, to supersede or supply defects in the original proof, though the application to vacate be founded only on the papers on which the order or warrant was granted. Nothing contained in this act shall prevent the court, by order granted on motion, from directing that the order or warrant and recitals therein be amended to conform to the proof. The court or a judge thereof to which or to whom an application to vacate the order or warrant is made upon notice, may permit such an amendment without notice, by a direction in the order determining the application."

You will observe that this section in no sense appears to authorize the courts, upon the hearing of a motion to vacate an order or warrant, to permit the amendment of formal defects or to permit the service of amended pleadings, but merely "to supersede or supply defects in the original *proof.*" Now, I suppose the word "proof" is to be taken in its original meaning and thus applies to what we may characterize as evidentiary matter submitted in support of the original application for a provisional remedy.

The only other matter referred to in Section 822 is contained in the general statement at the end of the section that nothing shall prevent the court from amending the order or warrant and recitals to conform to the proof; and the last sentence empowers the court or judge to "permit such an amendment with-

out notice." The words "such an amendment" no doubt refer to an amendment conforming the order or warrant and the recitals therein to the proof.

As we thus have a special section relating to defects or omissions of evidentiary matter, it would seem very clear that Section 105 and Section 822 must be construed together and that Section 105 is necessarily limited by the provisions of Section 822 which are applicable particularly to supplying new proof in support of a provisional remedy. Accordingly, I take it that if a motion to vacate an order or warrant is made, based upon the claim that the plaintiff has omitted certain essential evidentiary matter or based upon the claim that the evidentiary matter contained in the plaintiff's affidavits is insufficient, then pursuant to the terms of Section 822, the plaintiff should ask for an adjournment of the motion to vacate and an opportunity to file supplemental affidavits which shall supply the defect or omission. Also where the defect relates to the form of the order or warrant and the recitals therein, the court is empowered by Section 822 to conform the order or warrant and the recitals to the proof.

Turning to the matter of the complaint, we find in connection with arrests that the old conflict as to when a complaint must be used and as to when it need not be used in support of an application for an order of arrest is resolved by Section 833, which now contains the following new provision:

"Where a specific allegation in the complaint is necessary, by statute, to an arrest of the defendant, the complaint or a copy thereof or a proposed amended complaint must be produced."

Then the plaintiff's rights, in the event that by mistake or inadvertence he shall have prepared a defec-

tive complaint, are safeguarded by Section 843 which is also entirely new and which provides as follows:

"The service of a complaint which fails to set forth a cause of action in which an arrest is authorized or an allegation essential to the right of arrest shall be ground for vacating the order of arrest, subject to the power of the court, upon plaintiff's motion, at any time, to permit the complaint to be amended, to sustain the order, with or without terms. Before the determination of a motion to vacate an order of arrest, the court or judge hearing the motion may permit the plaintiff, without notice, to amend the complaint, to sustain the order."

It is a most significant fact that in connection with injunction and attachment there is no provision in the Civil Practice Act similar to Section 843 relating to arrests.

What then is the situation? While rather unfortunate, it seems to me that the inclusion of a special section giving the court the power to permit the service of an amended complaint to sustain an order of arrest and the omission to include a similar provision with reference to injunctions is susceptible of only one interpretation, namely, that where the plaintiff obtains a temporary injunction order under Section 877 of the Civil Practice Act, in which event it is well settled by decisions construing similar language used in the Code, that a complaint is necessary, then if the complaint is defective and the motion is made to vacate the injunction order, the courts are without power to permit the plaintiff to serve an amended complaint to sustain the order. The result is unfortunate, because had Section 843 been omitted entirely and had Section 822 been omitted entirely, it would seem to be very plain that under Section 105 the courts would have been authorized *in all cases* to permit amendments and the filing of supplemental papers generally in sup-

port of the order or warrant where the interests of justice required such action to be taken.

As to attachments, the question concerning the use of a defective complaint does not seem to arise, because a complaint is not required and it has been held that if a complaint is used and it proves to be defective, this is not a ground for vacating the warrant of attachment if the affidavit submitted in support of the original application contains sufficient evidentiary matter to make out a cause of action (*Shepherd v. Shepherd*, 51 Misc. 418, 421).

I have taken considerable time on this subject because it is one of great practical importance and because in the few matters which have already come before the courts since the Civil Practice Act took effect there is a good deal of confusion in the decisions as to whether the permission to the plaintiff to serve supplemental papers or to amend is given under Section 822 or Section 105. When the defect is one of proof, 822 is the section applicable; when it is a matter of conforming the order or warrant or recitals to the proof contained in the affidavits, then again Section 822 is a proper section; when it is a question of asking permission to serve an amended complaint, and a complaint is required, the only section available is Section 843, relating only to arrests, and in view of this specific section it would seem that the courts are not authorized even by the broad language of Section 105 to permit the service of an amended complaint to sustain a provisional remedy other than arrest; where the mistake, defect, omission or irregularity is one of any other name, nature and description then Section 105 seems to be plainly applicable.

Now let us turn to the specific provisions relating in

detail to the particular provisional remedies. We find that in Section 826, which is supposed to be merely a repetition in different form of former Section 549 of the Code, the changes merely consist in the rearrangement of the subject matter and the placing of the various kinds of actions in ten different subdivisions instead of in four separate subdivisions as was the case in Code Section 549. I have been unable to find anything in Section 826 of the Civil Practice Act to indicate that any change has been made, but it seems necessary where applying for provisional remedies under the Civil Practice Act to read the new language carefully in connection with each specific case as it arises. I have already found a number of instances where although no apparent change had been made, still where the language as rewritten was applied to the facts of specific cases, it seemed as though some change had been effected whether deliberately or inadvertently.

In Section 838 which provides generally that the plaintiff may fix a time within which the defendant must be arrested, the section provides that the defendant cannot be afterward arrested under the same order "unless the time be extended by the court, for cause." This amendment was necessary in order to bring Section 838 in harmony with Section 98, which I discussed under the general subject of incidental practice.

I am afraid the transfer of many of the provisions formerly contained in the Code with reference to the confinement of civil prisoners and the jail liberties generally, to various portions of the Prison Law and the Civil Rights Law, will only lead to confusion and inconvenience. It may be that as a matter of strict

logic the rules regulating prisoners and the jail liberties should be in the statute relating to prisons and to civil rights, but I have always felt that it would be much more convenient to the bar in general, and should meet no substantial opposition from any source, to place all the sections relating to arrest and discharge from arrest, as well as the provisions of law with reference to contempts and the punishment therefor in the Civil Practice Act. If an injunction order is obtained, served and disobeyed, it would seem as though common sense, as well as ordinary convenience, would suggest retaining in a single practice manual the provisions of law which beyond any question relate to procedure and which define the steps to be taken in order to punish the delinquent party for his contempt of court.

I am surprised that no attempt was made by the Committee which formulated the Civil Practice Act, to make the provisional remedy of arrest either more effective or less effective. As the matter now stands and as it stood for many years under the Code, the provisional remedy of arrest is practically a dead letter, except in those cases where shrewd and unscrupulous lawyers are able to so arrange the circumstances under which the original arrest is made as to blackmail the defendant into a settlement. There is only one instance in which the bail bond required by law is of any real value to the plaintiff and that is the isolated instance where the defendant is arrested because he is sued for the conversion of a chattel and has been guilty of concealing, removing and disposing of the same so that it cannot be found or taken by the Sheriff. In this particular instance, subdivision 2 of Section 849 provides that

the bond shall contain a clause to the effect "that the defendant will deliver it (the chattel) to the plaintiff, if delivery thereof is adjudged in the action *and will pay any sum recovered against him in the action.*" If the bail bond in every case contained a similar provision that the defendant would pay any judgment recovered against him in the action then the remedy of arrest would have some punch behind it. Certainly, if it is proper to compel the defendant to put up such a bail bond where he is guilty of concealing the chattel there would appear to be at least equal reasons for requiring such a bond where he is sued for fraud and deceit or for embezzlement or fraudulent misapplication of funds as provided in Section 826.

Furthermore, the provisions with reference to the jail liberties seem to be much too liberal and the rule which permits a man who is confined to the jail liberties pursuant to a bond for that purpose, to go beyond the limits and avoid imposing a liability upon the sureties where the defendant returns within the limits before an action is begun on the undertaking, is nothing short of absurd.

It may be that the provisional remedy of arrest is not compatible with our modern institutions and ways of doing things. It may be that the old days of imprisonment for debt, as the expression went, are gone forever and that an enlightened public policy is opposed to imprisonment of any kind because of the nonpayment of a sum of money. If that be so, then the provisional remedy of arrest should be entirely abolished. As it now stands it is useless in the vast majority of cases, and the provisions contained in the Civil Practice Act and the various statutes to which former sections of the Code have been transferred are full of

inconsistencies, technicalities and anomalies, with the result that it would be much better to have the remedy removed entirely than to permit it to remain in its present unsatisfactory state. The law should be either simplified and made effective or repealed.

In connection with the temporary injunction order the basic provisions of the Code on this subject are preserved intact (Sections 876-9). In Section 878, however, the words "by affidavit," are omitted in order to make the requirement as to the proof of extrinsic facts consistent with the general section (Section 816) which has been already discussed. Following out this same idea Section 881 now provides "the order may be granted upon proof that sufficient grounds exist therefor."

With reference to the undertaking to be filed in connection with the temporary injunction order, the sections on this subject have been generally amended so as to conform to the new provisions on the subject of bonds and undertakings generally which have already been discussed.

Similar changes have been made in connection with attachments and there is a new section (Section 909) which provides:

"The manner of attesting and issuing the warrant, whether granted by the court or a judge, may be regulated by rules."

The general procedure and indeed in most instances the very details of the Code practice have been retained as to each of the several particular provisional remedies.

LECTURE IX.

Trial Practice.

There have been several very important changes concerning trial practice which relate to the effect of motions for a dismissal and for the direction of a verdict and also to the amendment of pleadings at the trial.

The first of these changes has been the subject of considerable discussion at the bar and is Section 457a, which provides "the judge may direct a verdict when he would set aside a contrary verdict as against the weight of evidence."

Passing for the moment some of the interesting technical questions which this new section, which was added by the Legislature in 1921, suggests, the most discussed and perhaps the most important question concerns its constitutionality. It has been suggested by some very eminent members of the bar that this section violates the constitutional guarantee of a jury trial. In my opinion this contention is wholly without foundation. It seems to me a matter of plain common sense that if the court is given the power to set aside a verdict as against the weight of evidence, and such an order setting aside a verdict has never been supposed to in any sense violate the constitutional right of a party to a jury trial, then giving the court the power to pass upon the weight of evidence *before* the verdict cannot in any way be regarded as a violation of fundamental law. Surely the result to the defeated litigant is identical in the two cases; and it seems quite unlikely that modern courts will strain a point to declare such a reasonable and workable rule unconstitutional. This is particularly true when it is borne

in mind that the attitude of courts of last resort toward constitutional questions has been one of increasing liberality of construction.

By thus stating my own opinion in this matter I do not wish to mislead you into thinking that there is no substance whatever to the claim that Section 457a is unconstitutional. The question is really one of considerable doubt and the claim of unconstitutionality rests fundamentally upon the decision of the Court of Appeals in 1901 in *McDonald v. Metropolitan Street Railway Co.*, 167 N. Y. 66. In that case, although the plaintiff had presented evidence which made out a *prima facie* case in his favor, the proof produced by the defendant was so strong that the trial court directed a verdict in favor of the defendant. The Court of Appeals held that the direction of a verdict was not justified and laid down the rule that where there was any issue of fact presented by the evidence, it was the duty of the trial court to submit that issue to the jury, even in spite of the fact that the state of the evidence was such as to warrant the court in setting aside a contrary verdict. Had the Court of Appeals merely stated this rule as one of evidence or trial practice, there would be little basis for the contention, which is now being made, that Section 457a of the Civil Practice Act, is unconstitutional. The Court of Appeals in the *McDonald* case, however, went further and plainly intimated in various portions of the opinion that the reason upon which the decision was based was largely the constitutional guarantee of a jury trial.

There is, however, an important technical as well as practical aspect of Section 457a. In the first place, it is extremely improbable that, merely because of this

new provision, the trial judges will assume any more responsibility as to questions of fact than they have assumed in the past. Where the question is one of doubt, one may feel assured that the average trial judge will prefer to follow the old system of submitting the case to the jury and then later, and in a more leisurely manner, calmly consider the question of whether the verdict should be set aside as against the weight of evidence.

In the second place, the application of this rule to specific instances is not as clear as one might suppose. Take for example a case where the plaintiff's case is established by the testimony of interested witnesses and the defendant does not introduce any evidence on his behalf, but rests his case immediately after the plaintiff's last witness is called. The well settled rule under the Code was that as the plaintiff's case was established by the testimony of interested witnesses, the credibility of these witnesses was itself a question of fact which was required to be submitted to the jury. Is this rule to be regarded as changed by Section 457a? My own conclusion in this matter would be that the rule requiring such a case to be submitted to the jury remains unaffected by Section 457a; and yet, it would no doubt be possible to assume a case where, although the plaintiff's case depends *partly* upon the interested testimony of the plaintiff, this testimony is so sustained and corroborated by documentary evidence and other conceded facts as to make a record which would justify the court in the event that the jury should render a verdict for the defendant to set the verdict aside. In this *particular* case I apprehend that the trial court would be justified in directing a verdict for the plaintiff under Section 457a.

Then there is also to be considered what was known as the scintilla rule under the Code. Originally, where even the slightest evidence existed the courts were required to submit the case to the jury. Later, it was held that if the evidence did not amount to more than a mere scintilla the case could be decided as matter of law. This led to a number of decisions on the subject by the Court of Appeals which rested upon such fine distinctions as to leave most lawyers in doubt as to the exact state of the law on the subject.

I have read the many decisions of the Court of Appeals on this subject, within the last four or five years, with great care, and I must say that my own feeling about the matter is one of grave doubt and uncertainty, and I have never been able to convince myself that I entirely understood just what the real meaning of the scintilla rule was, as developed by these recent decisions.

Whatever doubt may have existed prior to the addition of Section 457a to the Civil Practice Act, it seems quite plain that the very purpose of this section is to do away with the doubts and uncertainties which surrounded the scintilla rule, and to formulate a provision which should be too clear for misunderstanding and which would lead to a more prompt and expeditious method of finally disposing of law suits.

Turning now to Section 482, we find very radical changes as to the effect of motions for the dismissal of the complaint. The Section is short and is as follows:

"A final judgment dismissing the complaint before the close of the plaintiff's evidence does not prevent a new action for the same cause of action, unless it expressly declares that it is rendered upon the merits. A dismissal of a complaint or a counterclaim at the close of the plaintiff's or defendant's evidence, as the case

may be, or a dismissal of a complaint or counterclaim at the close of the whole evidence, is a final determination of the merits of the cause of action and bars a new action between the same parties or their privies for the same cause of action unless the court shall dismiss without prejudice."

The first question for us to consider in connection with these new provisions is as to whether the Legislature intended to make any change in the fundamental basis for a non-suit on the one hand and a dismissal of the complaint on the merits on the other. I do not believe any such change was intended; and it seems to me that the trial court will be entitled to dismiss the complaint without prejudice or to non-suit the plaintiff where he has merely failed to prove a case, whereas, a dismissal on the merits may be made only where it appears from the evidence already taken that the plaintiff in fact *has no case.* In other words, if an action is brought for breach of a contract and the plaintiff at the trial proves the making of the contract and the breach thereof by the defendant together with the ensuing damage, but by reason of not calling or producing the necessary witnesses the plaintiff is unable to prove the due performance by him of certain conditions precedent contained in the contract, it seems very plain that whether the motion to dismiss be made before the end of the plaintiff's case, or at the end of the plaintiff's case, or at the end of the whole case, the motion should be merely for a dismissal without prejudice and if the court should dismiss on the merits under such circumstances, such a dismissal would seem to present reversible error. Another case which frequently arises is one where an action is brought to recover for fraud and deceit and the plaintiff makes ample proof of the making by the defendant of the representations, their falsity, the intent to deceive and

the actual deceit, but fails to prove any damage. Upon this state of the evidence the court should non-suit the plaintiff, but it would not be proper to dismiss the complaint on the merits as the plaintiff might at a new trial be able to produce the necessary proof of damage, which in actions of this character is an essential part of the cause of action itself.

Now, considering the first sentence of Section 482 we find two entirely new and quite important provisions. In the first place, it is directly contemplated that the court may dismiss the plaintiff's complaint "before the close of the plaintiff's evidence" although under the Code such a motion was not available to the defendant until the plaintiff had rested. In the second place it is provided that where a motion is made in terms "to dismiss the complaint" before the end of the plaintiff's case, without comment or qualification, then the granting of such a motion is a mere non-suit.

It is, however, clearly contemplated that a situation might arise making it appropriate for the defendant, even before the close of the plaintiff's case, to move for a dismissal of the complaint *on the merits,* the rule being that in such event, counsel for the defendant must so express himself in making his motion as to plainly state that the motion is made *on the merits.*

A case where such a motion on the merits was proper recently came to my attention. The action was one in equity for specific performance of a contract to sell a parcel of real estate located in Brooklyn. The contract had been made in 1917 and the purchaser had been present at the closing date ready to perform, but the seller had defaulted. Instead of promptly enforcing his rights, however, the buyer waited until 1919 when the value of the property had almost

doubled and he then brought his action in equity for specific performance. In the course of the cross-examination of the plaintiff the facts concerning the enhancement in value of the property were fully developed and it became very plain, even at that early stage of the case, not merely that the plaintiff was not making out a case, but that he in fact *had no case at all.* Upon these facts appearing the trial court stated to counsel or the defendant that he would entertain a motion to dismiss on the merits and the motion was made and promptly granted.

Turning now to the second sentence of Section 482, we find that the provisions contained therein, while perhaps of a formal and technical nature, are provisions of the greatest importance to the trial lawyer. Under the Code, if counsel for the defendant intended to make a motion addressed to the merits of the case, it was well settled that his motion was normally one for the direction of a verdict, although he could, after both sides had rested, make a motion in terms for the dismissal of the complaint on the merits. The effect of these two motions was substantially identical. Pursuant to the provisions of the second sentence in Section 482, however, a mere motion on behalf of the defendant for a dismissal of the complaint is presumed to be a motion addressed to the merits unless expressly stated to be made "without prejudice."

Of course, as pointed out a moment ago, the trial court may not even now dismiss the complaint on the merits if the state of the evidence is such as to warrant only a non-suit. On the other hand, it would be most unfortunate, if due to a misunderstanding of the new provisions of the Practice Act, counsel for the plaintiff were put to the expense of an appeal in order to estab-

lish his right to bring a new action for the same cause. To be explicit, let us suppose that counsel for the defendant at the close of the plaintiff's case, or even at the close of the whole case, makes a motion "to dismiss the complaint." The duty of counsel for the plaintiff under such circumstances, would plainly be to call the attention of the trial court to the fact that the state of the evidence did not justify a dismissal on the merits and he should suggest that the motion be changed so as to merely amount to a dismissal "without prejudice." No doubt counsel for the defendant would consent to such modification of his motion and in any event, whether he consented or not, the proposition would be properly presented to the trial court for consideration and the rights of the plaintiff fully safeguarded at the trial. Otherwise the granting of the motion to dismiss would be presumed to be on the merits and the only way the plaintiff could again litigate the matter would be to first appeal to the Appellate Division for a modification of the judgment of dismissal, or to move before the same justice for a modification of the record if the mistake were discovered in time.

In view of the radical changes accomplished by Section 457a and Section 482, the question has been discussed as to whether or not these sections or either of them make any change in the law with respect to the situation presented at the trial, where at the close of the case both sides move for the direction of a verdict. The answer to this question depends entirely upon the nature of the evidence before the court. If there is a substantial conflict in the evidence on some material point, then either of the parties is entitled to withdraw his motion for a direction of a verdict and re-

quest that the case be submitted to the jury. This was the rule under the Code as established by the more recent cases (*Brown Paint Co. v. Reinhardt,* 210 N. Y. 162), and there seems no reason to believe that such a result would in any way be changed by either Section 457a or Section 482 of the Civil Practice Act.

On the other hand, if the evidence in support of the plaintiff's case is so overwhelmingly strong as to warrant the court in setting aside a verdict for the defendant, then whether the plaintiff alone moves for the direction of a verdict or whether both sides move for the direction of a verdict, the court is authorized by Section 457a to direct a verdict for the plaintiff.

There is another very interesting phase of trial practice which perhaps should be discussed in connection with Section 482. I refer to the right of the plaintiff before the case has been disposed of to voluntarily move for permission to discontinue. This is an application which it has always been the right of a plaintiff to make at any time before the close of the case and in view of the stringent requirements and presumptions contained in Section 482, it is well to have this motion for leave to discontinue in mind as a possible manoeuvre. Let us suppose, for example, that toward the end of the plaintiff's case the trial court has indicated, by certain remarks, a disposition to dismiss the complaint on the merits. Is there anything to prevent the plaintiff from thereupon moving for leave to discontinue upon payment of costs? I think not. This application seems plainly to be open to the plaintiff where he fears a dismissal on the merits and believes he can make a better presentation of the case and produce much stronger

evidence if the action is begun over again and a new trial is thus obtained.

It does not seem as though such an application were available, however, after the defendant has made his motion for a dismissal of the complaint. Surely with one motion pending before the court and still undetermined, it is not possible for another party to the action to interpose a new motion which should destroy the effect of the motion already pending before the court. While this might be done, if counsel for the defendant consented to the withdrawal of his motion to dismiss, it is perfectly plain that he would not give any such consent, with the result that when the motion to dismiss has once been made, it is no longer open to the plaintiff to move for leave to discontinue.

There is another phase of trial practice which has been changed by the Civil Practice Act and the Rules of Civil Practice which will, as a practical matter be of much greater importance to lawyers generally than even Section 457a or Section 482. I refer to the new provisions concerning amendments at the trial, such amendments being provided for by Sections 434, 105, 111 and also by Rule 166.

Section 434 merely purports to lay down certain rules for the determination of a variance between the pleading and proof and is as follows:

"A variance between an allegation in a pleading and the proof is not material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defence upon the merits. Where the variance is not material, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs. Where, however, the allegation to which the proof is directed, is unproved, not in some particular or particulars only, but in its entire scope and meaning, it is not a case of variance, within this section, but a failure of proof."

The power to amend a pleading at the trial so as

to conform the pleading to the proof or otherwise is contained in Section 105 which has already been discussed and which provides generally with reference to the correction of mistakes, omissions, irregularities or defects or where a substantial right of any party shall thereby not be prejudiced, for the entire disregard of such mistake, omission, irregularity or defect.

Section 111, as you will recall, provides for the amendment of the pleadings or other papers where a mistake has been made in the prayer for relief, this section giving the court authority to amend the pleadings at the trial so as to demand the proper remedy appropriate to the facts as "pleaded or alleged, or proved."

The clearest and most important matter with respect to amendments, however, is found in Rule 166 which is so important that I shall read it in full, as follows:

"1. If a pleading be defective, whether for failure to state a cause of action, or a defense, or otherwise, and objection thereto has not been raised before the trial, the judge may permit it to be amended. If evidence be offered which is relevant to the controversy between the parties, but which is not admissible because the facts to the proof of which it is addressed are not sufficiently pleaded, or in case of variance between pleading and proof, the judge may permit an amendment conforming the pleadings to the proof. In granting any amendment hereinbefore provided for, the judge may adjourn the trial or direct a new trial, and impose terms and conditions in his discretion.

"2. A complaint or counterclaim need not be dismissed on the trial because of failure or a defect in proof, if it shall be made to appear that the evidence to supply the defect can be produced. In such case the judge may thereupon receive such evidence or adjourn the trial, or direct a new trial, on such terms as in his discretion shall be proper."

The effect of Rule 166 when read in connection with Section 105 and Section 434 is to entirely repeal and change the rule of the Code that the court at the trial was only authorized to permit an amendment of the

pleadings which did not substantially change the cause of action or defense. It will be recalled that where the amendment sought to be made did change substantially the cause of action or defense, the trial court was required to withdraw a juror so as to give the party who had made the mistake in pleading an opportunity to make a motion at Special Term for permission to serve an amended pleading in due course.

The full effect of these new provisions is perhaps best understood by considering a few of the instances where the courts denied the power to amend at the trial under the Code. There is one Appellate Division decision which holds that in an action to recover for breach of contract where the complaint contained an allegation that the plaintiff had duly performed all the conditions precedent on his part to be performed, the plaintiff was not entitled to amend at the trial so as to allege a waiver of performance instead of due performance. While it might, in a strictly technical sense, be accurate to say that this was a substantial change of the cause of action, it is very plain that the ends of justice did not require that a juror be withdrawn and the plaintiff compelled to make a separate motion at Special Term for permission to serve an amended complaint, to which the defendant in due time would serve an amended answer. Under Rule 166, the trial courts are now fully authorized to permit an amendment of any pleading at the trial, whether the amendment substantially changes the cause of action or defense or not. This new rule is bound to aid considerably in clearing up congested Trial Term or Special Term calendars and is in every way a desirable and salutary change in the practice.

Nor are the rights of any party to the case in any

way prejudiced by thus enlarging upon the power of the trial court, as it is provided that in granting any amendment, the judge may adjourn the trial or direct a new trial or impose terms and conditions in his discretion.

One or two cases have already arisen which throw some light upon the matter. In *Feizi v. Second Russian Insurance Co.*, 199 App. Div. 775, the trial court permitted the plaintiff to amend his complaint in certain particulars which the defendant's counsel claimed materially changed the cause of action. In view of the facts presented by counsel for the defendant the court in permitting the amendment adjourned the trial for two months. This action of the trial court was sustained by the Appellate Division, which properly held that Rule 166 was clearly applicable to actions pending prior to October 1, 1921.

The other decision of the Appellate Division, First Department, in *Stehli Silks Corporation v. Kleinberg*, 200 App. Div. 16, which held that a motion for permission to serve an amended pleading could be granted upon condition that the case retain its place upon the calendar, has already been referred to.

No doubt in the average case where the plaintiff desires to amend his complaint at the trial, counsel for the defendant will oppose the application and claim surprise and attempt to insist upon a mistrial. Under the present rules the trial court has the power to examine into the facts and make such decision as the facts and the interests of justice appear to require. In many cases, no doubt, the trial courts will insist upon a prompt disposition of the case in spite of the mere assertion of counsel for the defendant that he has been surprised and is not fully prepared to meet the issue

tendered by the complaint as amended. In other cases where the claim of surprise is shown to have some actual foundation, the trial court may grant a short adjournment or may withdraw a juror and grant a substantial adjournment, as the circumstances make necessary.

Application of provisions of Civil Practice Act and Rules of Civil Practice to Municipal Court of New York City and City Court of New York City.

A number of very interesting questions are bound to arise in connection with the general subject of how far and to what extent the provisions of the Civil Practice Act and the Rules of Civil Practice are applicable to the various inferior courts throughout the state and particularly to the Municipal Court of New York City and the City Court of New York City. At the outset, it is well to understand that the problems presented in connection with these two inferior courts are entirely separate and distinct. I mean by this that the question as to whether any particular provision of the Civil Practice Act is applicable to the Municipal Court and whether any particular remedy provided in the Civil Practice Act is available for use therein, is entirely distinct from the question as to whether the same provision or remedy is applicable or available in the City Court of New York City.

There is one phase of the problem, however, which is fundamental and which applies equally to both of these courts. That is the question of jurisdiction, and it requires no extended argument to convince one that there are a great many provisions and remedies set forth and described in the Civil Practice Act and the Rules of Civil Practice which cannot possibly be avail-

able either in the Municipal Court or in the City Court because of the limited jurisdiction of those two courts. The limitation is not so much the limitation to claims involving one thousand dollars in the Municipal Court and two thousand dollars in the City Court, as it is the limitation of jurisdiction to legal as distinct from equitable remedies. While it is true that both the City Court and the Municipal Court have a certain equitable jurisdiction, that jurisdiction is limited to the foreclosure of mechanics' liens (City Court Act, Section 18, subdivision 2; Municipal Court Code, Section 6), and in the Municipal Court to dispossess proceedings which are of course of an equitable nature and where the jurisdiction of the Municipal Court is unlimited. As to mechanic liens, even the equitable jurisdiction involved in these actions is restricted in the Municipal Court to cases involving not more than one thousand dollars, and in the City Court to cases not involving more than two thousand dollars. Generally speaking, these two courts have practically no equitable jurisdiction in the true sense of the word and therefore all those provisions of the Civil Practice Act and the Rules of Civil Practice which relate to suits in equity, to matrimonial actions, to state writs and mandamus, certiorari and prohibition orders, cannot by any possibility be applicable either to actions or proceedings in the Municipal Court or in the City Court.

Furthermore, in certain instances such as the declaratory judgments, it is specifically provided in the Civil Practice Act that the jurisdiction in such matters is to be exercised solely by the Supreme Court (Section 473).

Passing now to the more general provisions we find that the question is regulated with respect to the City

Court by Sections 79 and 80 of the New York City Court Act, which are so important that I shall read them in full:

"Sec. 79. Except as otherwise provided in this act, the provisions of law governing the practice and procedure in the following matters do not apply to an action or special proceeding in the city court of the city of New York, or before a justice thereof or to any proceeding therein:

1. The cases in which an order directing the service of a summons upon a defendant by publication may be made;
2. The granting of an injunction order in a case where the right of the injunction depends upon the nature of the action;
3. Security upon the granting of an injunction order to stay proceedings in an action;
4. The facts to be shown by affidavit to the satisfaction of the justice granting a warrant of attachment;
5. Directing references and appointing referees."

"Sec. 80. Except as in this act or otherwise specially provided the practice, pleadings, forms and procedure in the city court of New York shall conform, as nearly as may be, to the practice, pleadings, forms and procedure existing at the time in like causes in the supreme court, any statutory limitations, heretofore enacted, to the contrary thereof notwithstanding; but this act shall not be held to increase or diminish the jurisdiction of the city court of the city of New York as existing immediately prior to the time this act takes effect."

It is a very significant fact that Section 79 specifically makes applicable "the provisions of law" governing the practice and procedure in the Supreme Court generally, except as specially excluded; and there is an entirely separate section containing the general provision that the practice, pleadings, forms and procedure in the City Court shall conform as nearly as may be to the practice, pleadings, forms, and procedure in the Supreme Court.

With respect to the City Court, accordingly, the matter is quite simple and with the exception of the matters secifically excluded by Section 79, and the other matters which are eliminated because of the

limited jurisdiction of the court, it may be said that most of the details of practice and procedure in the City Court follow the practice as set forth in the Civil Practice Act and the Rules of Civil Practice. Accordingly, examinations before trial may be had pursuant to notice as provided in the Civil Practice Act; motions for summary judgment may be made pursuant to Rules 113 and 114; motions for consolidation and severance may be made pursuant to Sections 96 and 97 of the Civil Practice Act; Sections 105 to 112 of the Civil Practice Act with reference to mistakes, defects, omissions and irregularities are available, as well as the provisions concerning tenders and offers of judgment. These instances are enumerated merely by way of illustration as it is not thought necessary to attempt a detailed specification of all the provisions of the Civil Practice Act and Rules which are available in the City Court.

There is one further point about the City Court which is one of great importance. In rearranging the subject matter which had formerly been contained in the Code for the purpose of constructing a separate New York City Court Act, there was omitted entirely the former provision of the Code that appeals from a final judgment of the City Court to the Appellate Term must be made within ten days. The result of this omission was to change the rule as to such appeals to the Appellate Term from the City Court, so that an appellant now has thirty days to appeal from a final judgment of the City Court (*Waddell v. Madden,* App. Term, First Dept., N. Y. L. J., Dec. 16, 1921). It is to be noted that Section 73 of the New York City Court Act provides as to *interlocutory judgments* and *orders* that the appeal be taken within ten days after the ser-

vice of a copy of the judgment or order appealed from and a written notice of the date of the entry thereof.

The problem is more complicated concerning the Municipal Court, where the matter is largely regulated by Section 15 of the Municipal Court Code, which provides as follows:

"Except as otherwise provided in this act or in the rules, the practice, pleadings, forms and procedure in this court shall conform, as nearly as may be, to the practice, pleadings, forms and procedure existing at the time in like causes in the supreme court, any statutory limitations, heretofore enacted, to the contrary thereof notwithstanding."

If this section were the only one involved, one might well reach the conclusion that the application of any specific provision of the Civil Practice Act or the Rules of Civil Practice to the Municipal Court could generally be determined by merely examining the provisions of the Municipal Court Code on the subject and where the Municipal Court Code contained no specific provision governing the matter, then reaching the conclusion that the Civil Practice Act was available. This simple method of disposing of the matter is not adequate as Section 15 of the Municipal Court Code was added after the statute had originally been formulated, and more particularly as the Municipal Court did not become a court of record until a number of years after the formulation of the original statute, at which time the Commission which drafted the present Municipal Court Code stated in its report that by making the court one of record, no real increase in the powers of the court was intended. This whole question was thoroughly discussed in March, 1916, in connection with the power of the Municipal Court to examine parties before trial, pursuant to the practice then in vogue under the Code. It was then held that no such

power existed and the subject was very thoroughly reviewed by Mr. Justice Lehman, writing for the Appellate Term of the First Department in *Mitchell v. Schroeder,* 94 Misc. 270, which was affirmed by the Appellate Division in 174 App. Div. 857, on the reasons stated by Mr. Justice Lehman in the Appellate Term. While admitting the question to be one of considerable doubt the conclusion was reached that the Municipal Court had no power to direct the examination of parties before trial as provided in the Code because such power not having been specified in the statute as heretofore framed, it was thought that the mere change of the Municipal Court to a court of record, could not increase the powers of the court in any particular by implication or inference.

It is a significant fact that after the decision in *Mitchell v. Schroeder,* the Legislature added to Section 27 of the Municipal Court Code, subdivision 4 thereof, which is as follows:

> "The deposition of a party to an action in this court or of a person who expects to be a party to an action about to be brought in this court may be taken at his own instance or at the instance of an adverse party, or by a coplaintiff or codefendant at any time before or during the trial, in the same manner as such depositions are taken under the provisions of law applicable to like cases in the supreme court."

and since this amendment, which took effect in September, 1916, the power of the Municipal Court to examine *parties* before trial has been unquestioned.

With the decision of *Mitchell v. Schroeder* in mind, what is the situation at the present time in connection with the Civil Practice Act and the Rules of Civil Practice?

There are several very potent reasons for now adopting a different view of the matter. In the first

place, Section 1 of the Civil Practice Act specifically provides "this act shall be known as the civil practice act, and, except as otherwise expressly provided, shall apply to the civil practice *in all the courts of record of the state.*" Furthermore, Chapter 902 of the Laws of 1920, which provided for the Convention representing the Judiciary and the Bar to Consider and Adopt Rules of Civil Practice, directed the convention

> "To formulate and adopt suitable rules of practice inconsistent with the judiciary law nor with the special practice act, adopted by this Legislature, which shall be binding upon all the courts in this state and all the justices and judges thereof, except the court for the trial of impeachments and the court of appeals."

In view of these plain statutory enactments and in view of the fact that an entirely new scheme and system of procedure went into effect in this state on October 1, 1921, there is very excellent ground for the contention that the objections discussed in *Mitchell v. Schroeder* no longer exist. The result is that in order to determine at the present time whether a particular provision or remedy of the Civil Practice Act or the Rules of Civil Practice is available in the Municipal Court, it is only necessary to examine with care the specific provisions of the Municipal Court Code and if such specific provisions exist with reference to a particular matter, then in that event, provisions on the same subject in the Civil Practice Act or the Rules of Civil Practice are not available, otherwise they are available and may be used.

For the purpose of illustration it may be well to discuss a few specific points in connection with Municipal Court Practice. As to examinations before trial, it can in no sense be said that the Municipal Court Code is silent on this subject as it provided in subdivision 4

of Section 27 that a party may be examined before trial. The practice with respect to such examination, however, is not particularly prescribed, so that it is quite clear that parties may be examined before trial in the Municipal Court pursuant to the service of a notice as provided in Section 290 of the Civil Practice Act and the other provisions of Article 29 of the Civil Practice Act, with reference to the examination of parties before trial, are also applicable. It is important to note, however, that Section 27 does not cover examinations before trial generally so that there are a great many instances in which persons, other than parties, may be examined before trial in the Supreme Court and in the City Court, where similar examinations before trial are not available in the Municipal Court. That the method of taking the deposition of a party before trial pursuant to notice is available in the Municipal Court has been recently held by Mr. Justice Lauer in *Crowe v. Marsh Garage Co., Inc.* (N. Y. L. J., Jan. 24, 1922).

Another subject of considerable practical importance is as to whether a motion for summary judgment under Rules 113 and 114 of the Rules of Civil Practice may be made in the Municipal Court. As the Municipal Court Code contains no provision whatever on this subject and as the old limitation discussed in *Mitchell v. Schroeder* has now been removed, it has been properly held by the Appellate Term of the First Department in *Ritz-Carlton Restaurant & Hotel Co. v. Ditmars* (N. Y. L. J., Apr. 20, 1922), that such motions are available in the Municipal Court. The opinion in the *Ritz-Carlton Restaurant & Hotel Co.* was written by Mr. Justice Guy and discusses in some detail the points brought out in *Mitchell v. Schroeder.*

There are many matters, however, which appear to be governed entirely by specific provisions of the Municipal Court Code. Thus Sections 79 and 127 cover the matter of joinder and severance of causes of action. In this respect the provisions of the Municipal Court Code as to the original joinder of causes of action in the same complaint are even broader than the new provisions of the Civil Practice Act, as Section 79 of the Municipal Court Code permits a plaintiff to include in the same complaint *any* cause of which the court may have jurisdiction, so that all controversies between the parties may be finally disposed of in a single litigation.

The Municipal Court Code contains its own special provisions as to the form of summons (Section 20), the service of process (Sections 21, 22), substituted service of the summons (Section 23), arrest, attachment and replevin (Sections 29-69); and in other matters such as general trial practice, it would not seem that the provisions of the Civil Practice Act and the Rules of Civil Practice were applicable.

LECTURE X.

Declaratory Judgments.

While it is impossible to foretell the exact course of litigation in the future, it has been the prediction of many persons in a position to know the facts, that the provisions of the Civil Practice Act and the Rules of Civil Practice with reference to declaratory judgments will in time seriously change and perhaps revolutionize the course of litigation generally in this state. Before taking up the subject in detail, I wish to make a few general observations as to what the declaratory judgment is and as to its use in other states and countries.

Under the Code all judgments were what is known as coercive. If an action was brought for a sum of money only and the plaintiff won the case, the judgment directed that execution issue therefor, which was another way of saying that by giving the proper direction to the sheriff of the county in which any property of the defendant might be situated, the sheriff was thus authorized to forcibly take possession of such property and cause the same to be sold, the proceeds to be used in payment of the judgment. This was, of course, direct coercion. On the other hand, in an equity case the plaintiff, if successful, obtained a decree directing the defendant to do or to refrain from doing a certain act or series of acts. If the defendant disobeyed the decree, then through the medium of contempt proceedings the hand of the law was laid heavily upon his person and he was incarcerated until such time as he chose to obey the court's mandate. This again was direct coercion.

The difficulty with this system, which had been in vogue in this state for so many years, was that no matter what the nature of the controversy might be, with certain very slight exceptions which I will mention later, the parties had no means of ascertaining what their rights or relations might be, until such time as direct and perhaps irreparable damage had been done. Thus in the case of a controversy between two parties as to the meaning of a certain clause in a contract entered into between them, one could not come to court to ascertain what his rights might be until the contract had been broken, and an affirmative claim for damages existed. This was most unfortunate as the parties would no doubt have each preferred to have his rights under the contract fixed and determined before the fatal step, which constituted the alleged breach, was taken. Or, to take another typical example, a statute is passed regulating the conduct of persons in certain lines of business and prescribing substantial penalties involving perhaps direct imprisonment for failure to obey the regulatory provisions of the statute. No matter how much a person engaged in a particular line of business might wish to test out the constitutionality of the statute, and thus ascertain beyond question whether he was required to obey the law or not, the system of coercive judgments required that he first break the law and in that way furnish an actual case to be presented to the courts for decision.

I remember some years ago that a question arose concerning one of the sections of the Penal Law of this state and it was contended that the section should be construed in a certain way, which would have made a great difference in the method of transacting a cer-

tain line of business. In order to have the matter placed before the courts for adjudication, it was necessary to find some individual who was willing to take the risk; he did the act which the statute apparently prohibited, the district attorney who had been fully advised about the matter, caused his immediate arrest and, as he was taken into custody, a writ of habeas corpus, which had been prepared in advance, was served and the matter thus only after considerable trouble and expense finally brought before the court for determination.

It is the function of the declaratory judgment to merely declare what the rights and relations of the parties litigant under certain facts and circumstances may be. It is like a proceeding for the construction of a will which may be cited as a typical illustration of what the declaratory judgment is and the function it should perform. It does not in any sense involve coercion, but merely, as the name indicates, declares what the rights or relations of the parties may be.

The section of the Civil Practice Act on this point is entirely new and while in a certain sense indirectly based upon the English Practice Act, the language is quite dissimilar. Section 473 of the Civil Practice Act provides as follows:

"The supreme court shall have power in any action or proceeding to declare rights and other legal relations on request for such declaration whether or not further relief is or could be claimed, and such declaration shall have the force of a final judgment. Such provisions shall be made by rules as may be necessary and proper to carry into effect the provisions of this section."

This section is supplemented by five rules which are quite brief and which I shall read in full:

"Rule 210. An action in the supreme court to obtain a declaratory judgment, pursuant to section four hundred and seventy-three

of the civil practice act, in matters of procedure shall follow the forms and practice prescribed in the civil practice act and rules for other actions in that court.

"Rule 211. The prayer for relief in the complaint shall specify the precise rights and other legal relations of which a declaration is requested and whether further or consequential relief is or could be claimed. If further relief be claimed in the action, the nature and extent of such relief shall be stated.

"Rule 212. If, in the opinion of the court, the parties should be left to relief by existing forms of actions, or for other reasons, it may decline to pronounce a declaratory judgment, stating the grounds on which its discretion is so exercised.

"Rule 213. In order to settle questions of fact necessary to be determined before judgment can be rendered, the court may direct their submission to a jury. Such verdict may be taken by the court before which the action is pending for trial or hearing. The provisions of sections four hundred and twenty-nine and four hundred and thirty of the civil practice act apply to a verdict so rendered.

"Rule 214. Costs in such an action shall be discretionary and may be granted to or against any party to the action."

Before going into the substance of the matter more fully, it is well to pause at this point and observe that the procedure in connection with declaratory judgments follows the forms and practice as to other actions pending in the Supreme Court. This, I take it, means that an action in which a declaratory judgment is requested, will be begun by the service of an ordinary summons and complaint with the only difference that the prayer for judgment at the end of the complaint will be for a declaratory rather than a coercive judgment as in the past. The issue will be raised by the service of an answer and the case noticed for trial like any other ordinary action. As intimated in Rule 213, the case will be put either upon the Trial Term calendar or the equity calendar, depending upon whether the issues raised require the finding of a jury.

It is well to remember that the declaratory judgment in no sense resembles the submission of a controversy on an agreed statement of facts, which has been pos-

sible in New York and most other states for a great many years. The provisions of Sections 1279-81 of the Code of Civil Procedure, which found their source in the Code of Procedure, are now repeated almost *verbatim* as Sections 546-8 of the Civil Practice Act; and these provisions have been limited in their application to those cases, and those cases only, where the person named as plaintiff in the submission could bring an action at law or in equity against the person named therein as defendant (*Hanrahan v. Terminal Station Commission,* 206 N. Y. 494).

No doubt many of you would like a reference to some general literature on this subject so that you can go into it much more fully than is possible at this time and for that reason I shall very briefly refer to the leading articles on the subject. The best discussion I have been able to find is in a very searching article by Prof. Sunderland, entitled, "A Modern Evolution in Remedial Rights—the Declaratory Judgment," which appeared in 1917 in 16 Mich. Law Review 69, and a further series of articles by Prof. Borchard entitled "The Declaratory Judgment—a Needed Procedural Reform," which appeared in 1918 in 28 Yale Law Journal 1, 105, where the various authorities on the subject are exhaustively collected, reviewed and discussed. There is a short article which I wrote on the subject entitled "Some Phases of the New York Civil Practice Act and Rules," which appeared in the February, 1921, issue of the Columbia Law Review (21 Col. Law Review 113). My own article is in no sense a real contribution to the literature on this subject, but may be helpful to you merely because there are collected in the foot notes references to a good many articles and cases on the subject and particularly to

the various states of the Union where similar statutes have been passed, such as Connecticut, Florida, New Jersey, Rhode Island and Michigan.

At this point, and before discussing special phases of the subject further, I think I should discuss the question of the constitutionality of Section 473, as a recent decision in Michigan (*Anway v. Grand Rapids Ry.*, 179 N. W. 350), by the Supreme Court of that state, has held a similar statute to be unconstitutional and void on the ground that the giving of declaratory judgments was not in any sense the performance by the court of a judicial function, but merely consisted in the giving of legal advice. It is always easy to charge the court with the commission of judicial errors, but I do not recall any instance in my own experience where the decision of the highest court of any of our states appeared so clearly and palpably erroneous as the decision of the Supreme Court of Michigan in the *Anway* case. Had the court merely stated that in its opinion the particular case then pending before it was collusive and that it did not deem its function to be the handing out of legal advice, which is the function of the lawyers in Michigan as well as elsewhere, the matter would not have been so bad. The court went further, however, and felled the whole structure with a single blow on the theory that all declaratory judgments lacking the essential characteristic of coercion merely amounted to giving advice, which it was held was not in any sense a judicial function. This decision, if carried to its logical conclusion would, of course, deprive the courts of the power of construing wills or deeds, or in any sense, or under any circumstances rendering a decision or judgment which did not in

terms, direct the payment of money or the performance or non-performance of an act.

As this decision of the Michigan Court has been universally condemned and subjected to very bitter criticism, I shall not take up any more time in expressing my own views on the subject. I do not believe for a moment that the courts of this state are going to hold Section 473 of the Civil Practice Act unconstitutional in whole or in part.

Indeed, it is a rather significant circumstance that in a somewhat recent case (*Helme v. Buckelew,* 229 N. Y. 363, 372), which was decided by the Court of Appeals of this state, before the Supreme Court of Michigan published its decision in the *Anway* case, Mr. Justice Cardozo took occasion to say by way of *dictum:*

"Much may be said in favor of introducing the declaratory judgment into our law of procedure (Borchard, The Declaratory Judgment, 28 Yale L. J. 1, 105). I think, however, we may assume that the lawmakers, if they had intended to introduce such a reform by the enactment of section 1836a of the Code, would have revealed their purpose more distinctly. They would have used language similar to that of the new Practice Act, which establishes a new remedy for the future (Sec. 473, ch. 925, Laws of 1920, adopted May 21, 1920, to take effect April 15, 1921). They would not have begun by authorizing a declaratory judgment which would not settle anything by its declaration, since it would be of no force in the only jurisdiction where there is an estate to be administered."

It must be borne in mind, however, that a salutary word of warning is in fact to be found in the Michigan decision as it is undoubtedly quite true that our courts, under the New York State Constitution, are only empowered to perform judicial functions and it is in no sense a judicial function to give legal advice. Accordingly, one must be very careful in coming to court with a prayer for the entry of a declaratory judgment to have a real and not a purely simulated controversy to

present; otherwise, the courts would be literally swamped with a tremendous amount of this litigation based upon the desire of particular litigants to be advised in advance by the courts of what their rights and relations in a given state of facts might be. The problem is not a new one and I assume that the courts will find no insuperable difficulties in the ascertainment of those instances where real and genuine controversies exist and those other cases where the parties have merely chosen this means of attempting to get free advice from the courts.

The Convention to Formulate Rules of Civil Practice no doubt had this question very much in mind when they prepared Rule 212 which gives the court the power to, in its discretion, decline to pronounce a declaratory judgment where, in the opinion of the court, the parties should be left to relief by existing forms of action, *"or for other reasons."* In other words, the court may decline to entertain jurisdiction for any reason which the court may deem sufficient.

Returning to the general subject, there is another point which is fundamental and which must be thoroughly understood. A declaratory judgment differs from a coercive judgment merely in the one particular that it declares what the rights or relations of the parties may be but does not attempt to coerce anyone or to direct the parties to do or refrain from doing anything. It must not, however, be supposed that such a declaratory judgment is a mere form of words. Like any other judgment, it is absolutely final and binding upon all the parties to the case. Furthermore, when the rights or relations of the parties have been once established by a declaratory judgment, it is a natural and normal procedure to follow up such a declaratory

judgment when necessary with a further action in which a money judgment or an equitable decree is requested.

To take a typical illustration, let us suppose that an actual controversy arises between certain parties to a contract as to the construction of a certain ambiguous clause thereof. All persons having any interest in the controversy are brought before the court and a declaratory judgment is made construing the clause of the contract and declaring the rights of the parties in reference thereto. No appeal is taken from this judgment. One of the parties, however, who might be characterized as the defeated party in the declaratory judgment case, pays no attention to the declaratory judgment, refuses to be bound by the construction of the contract by the court and he proceeds to break the contract as thus construed. In such a case, as soon as substantial damages have accrued, the other party may bring an action in the regular form of an action at law for damages for breach of contract; and when this action comes on for trial the only questions to be litigated relate to the conduct of the party who has broken the contract, and the amount of the damages. The construction of the contract and the rights of the parties with reference thereto have already been finally and conclusively determined in the declaratory judgment case.

Nor is it to be supposed that the courts will proceed to render a declaratory judgment unless all the necessary parties are before the court. Section 193 of the Civil Practice Act, which states the general equity rule as to joinder of parties, is peculiarly applicable to declaratory judgment cases where the courts may be expected to be particularly careful lest a judgment be

rendered which shall necessarily affect the rights of some person not a party to the record.

The Declaratory Judgment in England.

As it is almost inevitable that our courts will turn to the English decisions with respect to the various questions which are bound to arise, I have thought it wise to discuss somewhat fully the development of the law in England with respect to declaratory judgments and to also discuss a considerable number of English decisions bearing on the points of most practical importance which will undoubtedly arise here within the next year or two.

Agitation for the declaratory judgment was commenced in England in 1828 by Lord Brougham, but the development of the law was rather slow and the declaratory judgment did not fully develop until 1883.

The first statute on the subject was the Chancery Procedure Act passed in 1852, Section 50 of which provided:

"No suit * * * shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Court to make binding declarations of right without granting consequential relief."

Prior to 1852 the Court of Chancery would not make any declarations of right unless it also gave some consequential relief. There were a few decisions indicating some apparent exceptions, but these are almost negligible. Thus in *Curtis v. Sheffield* (1882), 51 L. J. Ch. 535, 21 Ch. D. 1, it was indicated that in 1836 Vice-Chancellor Shadwell made seven declarations of right as to seven legacies given by the will of a testator, in which he declared the right of the present parties to be entitled to interest, and also their rights in the future after the death of various life tenants, there being no consequential relief given in that case.

In spite of the express authorization contained in Section 50 of the Chancery Procedure Act, the English courts were still reluctant to render such declaratory judgments generally, and it was held, even after this provision, that no declaratory judgment would be rendered unless some consequential relief was *or could be* claimed. Of course, the High Court of Chancery would render such a declaratory judgment if the consequential relief was not claimed, but the fact remained that the parties seeking a declaratory judgment must have had a right to some consequential relief if they chose to seek it (See *Rooke v. Lord Kensington,* 1856, 2 K. & J. 753, where the court held that under the power granted to the Court of Chancery in 1852 by Section 50 of 15 and 16 Vict. c. 86, a declaratory decree could only be granted in cases in which there was some equitable relief which might be granted if the plaintiff chose to ask for it). This narrow view prevailed until 1883, when Order XXV, Rule 5, went into effect. In the meantime, in 1873 by virtue of Sections 16 and 23 of the Judicature Act of that year, the jurisdiction of the High Court of Chancery was transferred to the High Court. This jurisdiction was to be exercised by the High Court in the manner provided by the Act and by such rules and orders of court as might be made pursuant to or under the Act. Section 17 of the Judicature Act of 1875 gave power to the Crown to make further rules for carrying the Acts of 1873 and 1875 into effect and this led to the famous Order XXV, Rule 5, of the Supreme Court Rules of 1883, which reads as follows:

"No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

This is the enactment pursuant to which declaratory judgments are rendered today in England.

Before discussing the English cases in detail, it may be worth while to notice that there is considerable difference in form between the English provision and the language of Section 473 of the Civil Practice Act which I have already read. While it might have been better to take over the language of the English law as it stood, I can find nothing in Section 473 of the Civil Practice Act to in any way indicate that such language should receive an interpretation in any degree more restricted and narrow than the interpretation of the English Order XXV, Rule 5, quoted above.

Before taking up any of the interesting specific questions or phases of declaratory judgments as applied by the Courts of England, I feel that it would be interesting and of material assistance to take note of what some of the English judges have said, indicating how they have regarded this power of making declaratory judgments; that is, whether they regarded it as a power to be liberally construed and applied or as one to be applied with considerable care and caution.

In the case of *Austen v. Collins* (1886), 54 L. T. R. 903, it was held under Order XXV, r. 5, that the Court has now jurisdiction to make a declaratory order, though no consequential relief is claimed, but such jurisdiction will be exercised with care and caution. At page 905, Chitty, J., said:

> "The rule leaves it to the discretion of the Court to pronounce a declaratory judgment when necessary, and it is a power which must be exercised with great care and jealousy."

The case of *Faber v. Gosworth Urban District Council* (1903), 88 L. T. R. 549, presents an interesting situation where the Court pointed out that the power

to make a declaratory judgment should be applied with care. The case was briefly this: The plaintiffs desired to develop a tract of land, almost two hundred acres in extent, by laying out a system of sewers, and building houses on the land. The proposed sewers ran from nine to eighteen inches in diameter, while those of the neighboring district, to which they wished to connect them, were only twelve inches in diameter. The neighboring district said the construction of such a series of sewers was in violation of a section of the Health Law, and that if the owner insisted on arbitration, they would raise this objection at all times. The owners then brought action for a declaration of their right to connect to the sewers of the neighboring district and for an injunction. The case by agreement was considered as a motion for judgment, and the claim for an injunction was not argued. Eady, J., stated:

"The plaintiffs now claim only a declaration, and it may well be that under the new practice a declaratory order might be made, having regard to Order XXV, r. 5. It has been pointed out that this jurisdiction ought to be exercised with extreme caution."

He then went on to point out how unsatisfactory it would be for him to make a declaration that the plaintiffs had a legal right to connect their sewers to those of the neighboring district, when he had no evidence before him as to what the result would be, and therefore refused to make a declaration.

In *North Eastern Marine Engineering Co. v. Leeds Forge Co.,* (1906) 1 Ch. 324, Joyce, J., after calling attention to the *obiter dictum* in *Williams v. North's Navigation Colleries,* 1889, Ld., (1904) 2 K. B. 44, to the effect that the declaration claimed must be ancillary to putting in suit some legal right, proceeded:

"Whether this be as plain and satisfactory a definition as could be wished I venture to doubt, but both sides agreed in saying that it was a matter for my discretion, a discretion which though it exists, according to the cases, must be exercised with extreme care and caution."

In *Dyson v. Attorney-General,* (1911) 1 K. B. 410, which was an action to have declared the invalidity of a form issued by public officials, at p. 417, Cozens-Hardy, M. R., said:

"But I desire to guard myself against the supposition that I hold that the person who expects to be made defendant, and prefers to be plaintiff, could, as a matter of right, obtain his object by commencing an action to obtain a declaration that his opponent has no good cause of action against him. The Court may well say 'Wait until you are attacked and then raise your defense,' and may dismiss the action with costs."

However, it is interesting to note that on appeal, where the judgment in this case was affirmed (1912) 1 Ch. 158, Moulton, L. J., said:

"So far from thinking that this action is open to objection on that score, I think that an action thus framed is the most convenient method of enabling the subject to test the justifiability of proceedings on the part of prominent officials purporting to act under statutory provisions. Such questions are growing more and more important, and I can think of no more suitable or adequate procedure for challenging the legality of such proceedings. It would be intolerable that millions of the public should have to choose between giving information to the Commissioners which they have no right to demand and incurring a severe penalty. There must be some way in which the validity of the threats of the Commissioners can be tested by those who are subjected to them before they render themselves liable to penalty, and I can conceive of no more convenient mode of doing so than by such an action as this."

In the case of *Burghes v. Attorney-General,* (1911) 2 Ch. 139, p. 156, Warrington, J., after holding that the Crown was a proper defendant in an action for a declaratory judgment, proceeded to say:

"But the jurisdiction is discretionary and should be exercised with great care and after due regard to all the circumstances of the case."

In the case of *Clay v. Booth* (C. A.), (1919) 1 Ch. 66, there is a typical expression by Duke, L. J., of the fear so often felt by the Courts that they are going to be unduly burdened by the volume of litigation whenever any new sort of procedure is developed or when an old practice is given a broader application. He says:

"I do not myself believe that, in the ordinary case of possible controversy between parties, it is open to one of the parties, because he apprehends a claim will be made against him, to serve a writ or other process upon the other party in order to obtain a decision that that claim could not be made. It seems to me to go far beyond anything which has existed in the past history of litigation in this country, and to open up a vista * * * a great danger * * * of needless and costly controversy fomented by parties who delight in litigation. * * * I am only referring to the grave prospect there is if any citizen who possibly supposes he may have litigation at some future time against him is to be entitled to safeguard himself and set his affairs right by making his supposititious antagonist the defendant to an action that might tend to keep possible litigants in a very cautious frame of mind; but I do not think it is within the right of the subject to start legal proceedings in such a state of things."

The courts seem to have taken a very constructive and liberal attitude with reference to the application of declaratory judgments to the amicable settlement of commercial disputes. With reference to these cases, they have expressed themselves as in favor of the extension and liberal application of the declaratory judgment on the ground that it is a material aid to business and commerce. For instance, in the case of *Guaranty Trust Co. v. Hannay & Co.*, (1915) 2 K. B. 536, Pickford, L. J., said:

"If such a meaning can be given to the rule I think it should be given. To narrow it as asked by the defendants would be to

put an end to what has been a most valuable procedure, especially in commercial matters. I may instance one case, *Société Maritime et Commerciale* v. *Venus Steam Shipping Co.* (9 Com. Cas. 289), in which questions involving most important matters on which immediate action was required were decided, which, apart from this rule, could only have been decided after great delay, inconvenience, and expense."

Also in *Guaranty Trust Co. v. Hannay & Co., supra,* at p. 572, Bankes, L. J., said:

"* * * and having regard to general business convenience and the importance of adapting the machinery of the Courts to the needs of suitors I think the rule should receive as liberal a construction as possible."

A good illustration of the efficacy of the declaratory judgment in commercial disputes is the case of *Societe Maritime et Commerciale v. Venus Steam Shipping Co.* (1904), 9 Com. Cas. 289, referred to by Pickford, L. J., *supra.* This was an action in which plaintiffs claimed a declaration that they were not bound to load the steamship Beppe. The plaintiffs, a society of workers, made a contract with one Locke to load ore onto ships furnished by Locke, not less than seventy-five thousand tons per year for five years. When the contract had about one year and a half to run, the defendants as assignees of Locke claimed that they were entitled to the benefits of the contract, and tendered the Beppe to be loaded according to the contract. The contract was assignable, but there had been no proper assignment to the defendants from Locke. The plaintiffs sought a declaration, as above noted. In the course of his judgment granting them a declaration that they were not obligated to perform under the contract and render services to the defendants until a proper assignment was made to them from Locke, Channell, J., stated:

"I think that in reference to a mercantile transaction of this sort parties are entitled now to come to the Court and say, 'It is important to us in reference to this contract, which has a year and a half to run, to know whether we are bound by it or not.' I think they are entitled to come, showing a reason for asking that, to ask for a declaration. They are not entitled to come and ask a Court of law for an opinion upon a speculative or academic question; but showing the necessity of a decision upon it, I think they are entitled to a declaration as to whether or not the contract is binding upon them. They are not bound at their peril to refuse to perform it and then to be liable to heavy damages for not performing it for the space of the next year and a half. If they are wrong, they would be liable for damages down to the time of the judgment of the Court while they are refusing to perform; but upon the Court saying that they were bound, they would then say: 'We will now go on with it for the remainder of the time.' I think that is a sufficient reason. I think, therefore, that they are entitled to some form of declaration that they are not bound to the defendants in the present state of things."

It can be easily seen what a great advantage it is in such a case for a party who believes that he is justified in refusing to perform to be able to go to the Court and ask for a declaration to that effect, rather than being obliged to go upon his own assumption, or that of his counsel, and refuse to perform and take the chance of incurring heavy damages by so doing if it develops that he was obligated to perform.

Now let us discuss some of the specific points which have led to discussion in the English decisions and to the formulation of certain judicial rules established by adjudications which the courts here in New York will very probably follow.

No Declaration Where Special Tribunal Can Handle Situation.

Where a special tribunal or a special procedure has been appointed or set up for the handling of a particular situation, the courts are not disposed to make a declaration, but rather to leave the parties to seek

the solution of the situation by an action before the tribunal constituted to handle it, or by means of the procedure set up to take care of such a situation. In this connection, I may point to the case of *Burghes v. Attorney-General,* (1911) 2 Ch. 139, affd. (1912) 1 Ch. 173, where it was said:

"There is one point remaining to be noticed. In *Grand Junction Waterworks Co.* v. *Hampton Urban Council* (1898, 2 Ch. 331), it was held that where the Legislature has appointed a special tribunal for the decision of a question, this Court ought not, except in very special cases, to interfere by injunction or declaration of right, and thus withdraw the case from that tribunal."

In the case of *Barraclough v. Brown,* (1897) A. C. 615, power to decide the dispute as to the particular subject-matter had been taken away by the statute from the High Court as a Court of first instance, and given to another tribunal. So there was a want of jurisdiction to consider the subject-matter under any circumstances.

In the case of *Bull v. Attorney-General for New South Wales,* (1916) A. C. 564, a declaration was refused in an action to have an extension of the term of an improvement lease, granted under the Crown Lands Act, 1895, of New South Wales, declared void. It was held that Section 44 of that Act applied to the extension, and that it was not void, but voidable. However, the Court declared that the information for a declaration that it was void could not be maintained, and that it could only be declared void by the procedure provided by Section 44 of the above Act.

Value as an Alternative Remedy.

The declaratory judgment is of great value to litigants as an alternative remedy, where the main relief

asked for cannot be given for some reason. Because of this, in actions for injunctions and other relief, there is usually contained a request for a declaration if the injunction or other relief cannot be given. A good illustration of the use of the declaration as an alternative remedy is the case of *Vestry of the Parish of St. Mary, Islington v. Hornsey Urban District Council,* (C. A.) (1900) 1 Ch. 695. In this case, the defendants had made an arrangement with the plaintiffs for the discharge of some sewage from the defendants' sewers into the sewers of the plaintiffs' district, and the volume of the sewage discharged into the plaintiffs' sewers had become so great as to choke them up. Plaintiffs sought an injunction, restraining the defendants from any further discharge of sewage into their, the plaintiffs', sewers. The Court refused the injunction on the ground of the great difficulty in which the defendants would find themselves if their sewers were put out of use, but made a declaration that the defendants were not entitled to send sewage from their district into the plaintiffs' sewers without the consent of the plaintiffs, and the plaintiffs were at liberty to apply to the judge to whose court this action was attached, at the end of twelve months, to enforce their rights as above declared.

It can be readily seen that if the plaintiffs did not have the alternative remedy of a declaration that, when their injunction was refused, they would have gained nothing at all definite by the proceeding. As it was, the judge refused their request for an injunction on the ground of the serious difficulty in which the defendants would find themselves if their sewers were closed, but it is to be noted that he made the declaration as an alternative remedy that the defendants had

no right to send sewage into the district of the plaintiffs without their consent, and that the plaintiffs could apply to the Court after a period of twelve months to enforce their rights. This was, of course, to give the defendants a chance to make different arrangements. The defendants were, therefore, apprised of the legal rights of the plaintiffs, and would be able to remedy the situation before the expiration of the twelve months. If they did not do so, then, upon the application of the plaintiffs, the Court would give the coercive relief demanded. It is quite apparent that this disposition of the matter was so much more equitable to all concerned, and so much more liable to work out a convenient and effective solution of the difficulty, than if the Court had been compelled to just either grant or refuse the injunction.

It seems that a declaratory judgment will not be rendered unless it is asked for. However, in *Evans v. Manchester, Sheffield & Lincolnshire R. R. Co.* (1887), 36 Ch. D. 626, an exception was made, and the declaration was given, although the action was only for an injunction and damages. The facts in that case were very simple. A mill was constructed upon the banks of a canal, and the working of a coal mine caused both to subside, resulting in the overflowing of the water from the canal into the mill. The Court could not give an injunction because the action was not brought as provided by statute, but they declared that the water from the defendants' canal had overflowed into the plaintiff's mill and that the defendants were liable for the injury caused thereby. Thus a declaration was made, even though it was not asked for.

The Negative Declaration.

Upon making a study of the English cases regarding declaratory judgments, it is quite apparent that one of the main things which has caused serious doubt and question is whether or not the power to make a declaratory judgment under Order XXV, r. 5, extended to cases where the party who sought the declaratory judgment had no cause of action, in other words, where plaintiffs sought to have rendered a declaration of their freedom from obligation to the defendants on contract or otherwise, or where they sought a merely negative declaration of jural relations. Until 1915, this question was not definitely decided, and there were decisions to the effect that a cause of action was necessary, or at least, that the plaintiffs had to have some right or claim against the defendants which they could enforce even though they were not attempting to do so, as well as decisions holding that this was not necessary. In 1915, in the very important case of *Guaranty Trust Co. v. Hannay & Co.* (C. A. [1915], 2 K. B. 536), two out of three Justices held that a cause of action was not a condition precedent, and this seems to have definitely settled this question, because the decisions which have been rendered since 1915 would seem to indicate that the Judiciary have accepted this case as the controlling authority upon this point. As this question of whether or not a negative declaration could be made by the courts has caused so much difficulty and has been given so much thought and consideration by various English courts, it may be interesting to refer to some of the outstanding cases on this subject.

In the case of *Austen v. Collins* (1886), 54 L. T. R. 903, it was held under Order XXV, r. 5, that the Court had jurisdiction to make a declaratory order, though

no consequential relief was claimed, but such jurisdiction would be exercised with great caution.

In *Brooking v. Maudsley Son & Field* (1888), 38 Ch. D. 636, Stirling, J., said at page 644:

"The present Plaintiff comes before the Court without alleging any case which would give a Court of Equity jurisdiction, either exclusive or concurrent with the Courts of Law. The sole ground on which he claims the relief is that, although there is a good legal defense to any claim by the Defendants against him, that defense depends on extrinsic facts, the evidence of which may not be forthcoming at all times and under all circumstances."

The Court said that the proper proceeding under the circumstances would be an action to perpetuate testimony, and refused to give the declaration requested. This case has been much cited by those who held that the plaintiff must have a cause of action. It is true that the plaintiff had no cause of action in this case, and that they were merely asking for a declaration that they had a good defense to any claim which might be set up by the defendants against them. However, it seems that the ground upon which the declaration was refused was that the relief requested should be obtained by an action to perpetuate testimony and not by an action for a declaration; in other words, that the court in this action for the declaration had no jurisdiction in the matter.

One of the leading cases on negative declarations is *London Association of Shipowners v. London and India Docks Committee* (1892, 3 Ch. 242). This was an action by *London Association of Shipowners and Brokers, Ltd.*, and the *Peninsular and Oriental Steam Navigation Co.*, a member of the plaintiff association and a customer of the docks in question, for a declaration that certain regulations issued by the defendants were invalid until confirmed in the manner prescribed

by statute, and for an injunction enjoining them from enforcing such regulations. The *Association* was held to have no maintainable action, and the *Peninsular and Oriental Steam Navigation Co.* who were customers of the docks used only appropriated berths, but as was pointed out in the case, it was reasonable to suppose that they might sometime want one or more unappropriated berths. They claimed that they had a right to the unappropriated berths unfettered by the restrictions contained in the regulations which were passed. The Court of Appeal rendered a declaratory judgment that the regulations in respect to the unappropriated berths were invalid as to the *Navigation Company.* This was one of the cases relied upon by Pickford, L. J. and Bankes, L. J., in their judgments in the case of *Guaranty Trust Co. v. Hannay & Co.* There was no cause of action in the *Navigation Company* against the *Docks Committee* here, but it seems that a right which they possessed was being infringed upon by these regulations, namely, their right to have unfettered unappropriated berths should they desire them.

The case of *Barraclough v. Brown,* 1897, A. C. 615, has been much relied upon by the exponents of the theory that a cause of action is a condition precedent to a declaration. This was a case where the power to decide the dispute as to the particular subject-matter had been taken away by statute from the High Court as a Court of first instance and given to another tribunal, so that there was a want of jurisdiction to consider the subject-matter under any circumstances. Pickford, L. J., in *Guaranty Trust Co. v. Hannay & Co.,* said:

"If it (Rule 5) adds to the jurisdiction in the first sense of giving power to deal with matters which could not in any case or under any circumstances be entertained it is ultra vires, and it is to this state of things that the remarks of Lord Davey in

Barraclough v. *Brown* were addressed. But if its only effect is to provide that the Court may deal with a matter with which it can already deal in a different manner under different circumstances and when brought before it by a different person, it is, in my opinion, only dealing with practice and procedure and is intra vires."

This case of *Barraclough v. Brown* is to be distinguished from *Westbury-on-Severn Rural Sanitary Authority v. Meredith* (30 Ch. D. 387), where the court had authority to pass on the subject-matter, provided there was a certain amount involved. The word jurisdiction seems to be used loosely in both cases. There is really a clear distinction between "jurisdiction" as applied to a case where the court has no jurisdiction to consider the subject-matter under any circumstances, and to a case where the court has no jurisdiction to consider the action because a certain amount is not involved.

In the case of *The Manar* (1903), P. 95, the plaintiffs, *The Northern Trust, Ltd.*, were mortgagees of *The Manar* to secure funds advanced to it. Default was made in payment and they took over the operation of the ship and chartered it to a party to take a cargo to France. The defendants were a firm who had furnished supplies to the ship, and not having been paid, secured a judgment by default in England. They made this judgment executory in France and when *The Manar* arrived there with her cargo, they arrested her. The plaintiffs asked for a declaratory judgment that they as mortgagees in possession were entitled to possession and control of the ship and her freight in priority to the necessaries men and to the mortgagors. The declaration was allowed against the necessaries men because from the testimony of French legal experts it appeared that this might be an assistance to

the plaintiffs in protecting their rights in France. In this case there seems to have been a good cause of action by the plaintiffs against the necessaries men who were interfering with the ship which was lawfully in possession of the plaintiffs as mortgagees in possession.

The case of *Williams v. North's Navigation Collieries*, (1904) 2 K. B. 44, was an action by workmen against their employers to recover amounts deducted from their wages by the employers, and claiming a declaration that such deductions were illegal under the Truck Act, 1831, and an injunction to restrain the defendants from making similar deductions from wages in the future. Collins, M. R., at pp. 48-49, said:

"When the case first came before Romer, L. J. and myself as an interlocutory matter, we came to the conclusion that it could not be conveniently dealt with in that way, and, if it were so dealt with, it could only be by discharging the injunction and leaving the real question in the case to be determined at the trial. Both parties, however, were desirous that this Court should deal with the merits of the case as a whole, and it was accordingly arranged to treat the case as a final appeal and to let it be dealt with by a full Court of three judges. To bring about that result the plaintiffs were obliged to throw over the greater part of their suggested cause of action and to confine themselves to claiming a declaration by the Court on the question which both parties desire to have decided, namely, whether a set-off against wages insisted on by an employer at the time of the payment of wages was a violation of the Truck Act, 1831. We felt that there would be a difficulty in making the declaration which the plaintiffs asked for, even if we should be of opinion that such a set-off was a violation of the statute, because, even on the view of the plaintiffs, who asked for it, the declaration would not be ancillary to the putting in suit of any legal right. (This was characterized in *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.*, (1906) 1 Ch. 324, at p. 329, as an obiter dictum). But with a view to meet the pressure which was put on us by both sides rather than from an opinion that the case could satisfactorily be dealt with by making such a declaration, we agreed to hear the case and determine it, as far as possible, on its merits."

A case in which a declaration was given where there

was no cause of action or claim by the plaintiffs against the defendants was *Société Maritime et Commerciale v. Venus Steam Shipping Company* (1904), 9 Com. Cas. 289. I have mentioned this case previously in another connection. You will recall that this was an action in which plaintiffs, a society of workmen, claimed a declaration that they were not bound to load the steamship Beppe. Plaintiffs made a contract with one Locke to load ore onto ships furnished by Locke, not less than 75,000 tons per year for five years. When the contract had about a year and a half to run, defendants claimed that they, as assignees of Locke, were entitled to the benefit of the contract and in accordance with their claim they tendered the Beppe to be loaded under the contract. The Court held the contract was assignable but there was no evidence of any proper assignment to the defendants from Locke, and they gave a declaratory judgment that the plaintiffs were not obliged to load the ore on the Beppe under the terms of the contract. This is plainly a case where a negative declaration was given. It was simply a declaration of freedom from obligation or liability under a contract. Of course, this was a commercial case and the courts have almost without exception been in favor of a liberal application of the power to make declaratory judgments whenever a commercial dispute arose.

In *North Eastern Marine Engineering Co. v. Leeds Forge Co.,* (1906) 1 Ch. 324, the plaintiff was claiming merely a declaration of invalidity of letters patent where no legal right of the plaintiff had been infringed. At pp. 328-9, Joyce, J., referred to the old rule that plaintiff must be entitled to consequential relief

whether he asked for it or not and after quoting Order XXV, r. 5, he proceeded:

"To the operation of that rule there must, however, be some limitation. It cannot, I think, compel the Court to entertain any and every action for a declaration, and it cannot be that a claim for any declaration whatsoever it may be is a good ground of action. What the limitation is I am not prepared to say, and I am not going to attempt to define it. There is an obiter dictum of the present Master of the Rolls in *Williams* v. *North's Navigation Collieries* (1889), Ld. (1904- 2 K. B. 44), that the declaration claimed must be ancillary to putting in suit some legal right. Whether this be as plain and satisfactory a definition as could be wished I venture to doubt, but both sides agreed in saying that it was a matter for my discretion, a discretion which if it exists, according to the cases, must be exercised with extreme care and caution."

In the same year, 1906, in the case of *Offin v. Rochford Rural District Council,* (1906) 1 Ch. 342, there was a certain and definite expression of opinion that a cause of action in the plaintiff was necessary as a condition precedent to a declaration. This was an action for a declaration that a triangular piece of land belonged to the plaintiff and that no part thereof formed part of the highway, or was subject to any public right of way or other right; and for an injunction to restrain the defendants from interfering with any inclosure of the land by the plaintiff and from trespassing for any purpose on the land. Warrington, J., at p. 357 said:

"At one time I thought it was possible that the plaintiff might be helped by the Rules of the Supreme Court, Order XXV, r. 5, which enables the court to make a declaration without giving any specific relief; but, on consideration, I do not think that is so. I think that, in order to justify an action, there must still, as before that rule, be some cause of action; and all that the rule means is, that if there is a cause of action the plaintiff may ask, and the Court may award, merely a declaration asserting his right without awarding damages or an injunction or any other form of specific relief. But in order to justify an action there must be still, as before the rule, a cause of action."

The learned justice did not cite any authorities upon which he based his judgment in this respect evidently being guided solely by his interpretation of the power given by Rule 5. Later he reversed his position in this respect in his decision in the case of *Burghes v. Attorney-General,* (1911) 2 Ch. 139, see *post,* p. 236.

Chapman v. Michaelson, (A. C.) (1909) 1 Ch. 238, was an action by a trustee of a debtor against a money lender, who, to secure himself, had taken a mortgage against the debtor, for a declaration that the mortgage was illegal and void under s. 2 of the Money-Lenders' Act, 1900. It was here held that the Court had power to give a declaratory judgment even though no ancillary relief was claimed.

In my opinion one of the strongest cases prior to *Guaranty Trust Co. v. Hannay & Co.* in favor of the negative declaration is the case of *Dyson v. Attorney-General,* (1911) 1 K. B. 410, affd. (A. C.) (1912) 1 Ch. 158. This was an action against the Attorney-General to test the validity of a notice issued by the Commissioners of Inland Revenue under the Finance (1909-1910) Act, 1910, commonly known as Form IV.

It is clear that the plaintiff in this case had no cause of action and was seeking merely a declaration that certain forms requesting information issued by public officials were invalid and that he was not obligated to furnish the information. It is difficult to conceive of a better illustration of a request for a declaration where the plaintiff has no right or claim against the defendants. Cozens-Hardy, M. R., said at p. 417:

"The Court is not bound to make a mere declaratory judgment, and in the exercise of its discretion will have regard to all the circumstances of the case. I can, however, conceive many cases in which a declaratory judgment may be highly convenient, and I am disposed to think if all other objections are removed, this is a case to which r. 5 might with advantage be applied."

The same justice when the case appeared before him on appeal to the Court of Appeal (C. A.) (1912) 1 Ch. 158, had the following to say:

"In my judgment on the interlocutory appeal, to which I adhere, I pointed out that the jurisdiction to make a declaratory order is discretionary. And it has been urged by the Attorney-General that in our discretion no order ought to be made. I am bound to say that, assuming the jurisdiction to exist, I cannot imagine a more proper case for its exercise. It is no light matter for the Commissioners to issue broadcast forms which purport to impose obligations which do not exist and which add a threat of a penalty in case of non-compliance. A general declaration is pre-eminently desirable in these circumstances. And I am a little surprised that the Commissioners do not welcome a decision which will guide their action in the future. Their contention that no Court should interfere unless and until a penalty is sued for seems extravagant. The result is that, in my opinion, the appeal in Dyson's case must be dismissed."

At p. 168, *Fletcher Moulton, L. J.*, said:

"So far from thinking that this action is open to objection on that score, I think that an action thus framed is the most convenient method of enabling the subject to test the justifiability of proceedings on the part of prominent officials purporting to act under statutory provisions. Such questions are growing more and more important, and I can think of no more suitable or adequate procedure for challenging the legality of such proceedings. It would be intolerable that millions of the public should have to choose between giving information to the Commissioners which they have no right to demand and incurring a severe penalty. There must be some way in which the validity of the threats of the Commissioners can be tested by those who are subjected to them before they render themselves liable to penalty, and I can conceive of no more convenient mode of doing so than by such an action as this."

There does not seem to be a cause of action in the case of *Burghes v. Attorney-General,* (1911) 2 Ch. 139, affd (1912) 1 Ch. 173. This was a case where the situation was very similar to that presented by the case of *Dyson v. Attorney-General, supra.* The plaintiff had received certain notices sent out by the Com-

missioners of Inland Revenue under the Finance (1909-1910) Act, 1910, directing him to fill in forms calling for information as to rents received, etc., regarding property owned, all for the purpose of fixing valuations. He failed to comply with the request in the notices and soon afterward received further notices threatening heavy penalties if he did not comply. He then brought action against the Attorney-General for a declaration that the form issued by the Commissioners of Inland Revenue known as Form VIII was illegal, unauthorized and ultra vires, and that he was not under any obligation to comply with the requests of the form or any of them. He surely had no cause of action against anyone. On the contrary, there was an apparent cause of action against him because he had not complied with the requests of the Commissioners of Inland Revenue. They were threatening him with penalties if he did not comply and it was to have declared his freedom from liability or obligation that he sought the declaration. In my opinion this was clearly a case of the granting of a negative declaratory judgment, but this case was not regarded as making certain the proposition that a negative declaration could be made. However, in 1915 it was one of the cases relied upon by Pickford, L. J., and Bankes, L. J., in their judgments in *Guaranty Trust Co. v. Hannay & Co.* (1915, 2 K. B. 536), wherein they held in favor of the negative declaration.

In this case Warrington, J., reversed the position which he had taken in the case of *Offin v. Rochford Rural Council* (*ante,* p. 233), in 1906, having evidently come to a different conclusion in the interval of three or four years between the two decisions. In this case in 1911 he said:

"But Order XXV, r. 5, is intended to deal with the very case—that is, one in which no relief can be claimed either by way of damages for the past or an injunction for the future, and, in fact, in several cases declarations have been made under this Order where there was no cause of action in the proper sense. I refer to cases of which *Jenkins* v. *Price* (1907, 2 Ch. 229), is an example."

It was not until 1915 that it was definitely and clearly decided by the English courts that a negative declaration could be made. In that year the important case of *Guaranty Trust Co. of New York v. Hannay & Co.*, (1915) 2 K. B. 536, was decided. The plaintiffs were bankers doing business in New York with a branch office in London. The defendants were a Liverpool business firm which bought cotton from American owners through brokers on the Liverpool Cotton Exchange. The American sellers of the cotton drew bills of exchange for the cotton on the defendants or their bankers in Liverpool and attached to them what purported to be bills of lading and insurance certificates relating to the shipments covering which the bills of exchange were drawn. The bills of exchange were sold to plaintiffs in the ordinary course of business in New York, and were accepted and paid by defendants or their bankers. It developed that some of the bills of lading were forgeries, and in connection with one of them the defendants brought an action in 1911 against the plaintiffs in the U. S. Circuit Court for the Southern District of New York to recover the amount paid by the defendants. They secured judgment in the District Court but on appeal to the U. S. Circuit Court of Appeals a new trial was ordered. The Circuit Court of Appeals said that the case was governed by English law. Then, while the new trial was pending, the defendants in that action, the present plaintiffs, brought this action in the King's Bench Division to

have a declaration made that they were not liable to repay to the defendants any sums paid by them to the *Guaranty Trust Co.* on account of the bills of exchange.

It was decided by two of the three judges that this declaration could be made in spite of the fact that the plaintiff had no cause of action. Buckley, L. J., the third justice, very definitely held that a cause of action was a condition precedent. He said at p. 548:

"Neither declaration nor injunction nor relief is, in my judgment, within the jurisdiction of the Court's notice unless it be founded upon alleged facts showing (if true) a cause of action."

The learned justice was quite troubled with reference to the question of jurisdiction. He said:

"But it is impossible, I think, to read the words of the rule as giving the Court power to make the declaration where there is no cause of action. If that were its effect, this part of the rule would be ultra vires. If there is no cause of action there is, in my opinion, no jurisdiction. A rule cannot create jurisdiction. The rule is only one of procedure; per Lord Davey in *Barraclough* v. *Brown* (1897-A. C. at p. 624)."

Pickford, L. J., in his judgment got around this question in the following manner:

"The next question is whether if this be the meaning of the rule it is ultra vires. It is said to be so because it adds to the jurisdiction of the Court, which cannot be done by rules of practice and procedure. The word 'jurisdiction' and the expression 'the Court has no jurisdiction' are used in two different senses which I think often leads to confusion. The first and, in my opinion, the only really correct sense of the expression that the Court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject-matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, i. e., that although the Court has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances.

"The distinction is, I think, well shown by the two cases of *Barraclough* v. *Brown* (1897-A. C. 615) and *Westbury-on-Severn Rural Sanitary Authority* v. *Meredith* (30 Ch. D. 387). In the first case there was a true want of jurisdiction. The power to decide

the dispute as to the particular subject-matter had been taken away by the statute from the High Court as a Court of first instance and given to another tribunal. In the second, the Court could decide the dispute and give the relief, but by a settled practice embodied in a rule it would not do so except under certain circumstances, i. e., if the subject-matter was of the value of 10£ or over. Yet Lord Esher, M. R., in *Westbury-on-Severn Rural Sanitary Authority* v. *Meredith* (*supra*), used the expression 'jurisdiction' although clearly what was laid down by a rule could be altered by a rule, and the expression is used in this sense in many cases. It is, I think, necessary to keep this distinction in mind in considering whether this rule is ultra vires. If it adds to the jurisdiction in the first sense of giving power to deal with matters which could not in any case or under any circumstances be entertained it is ultra vires, and it is to this state of things that the remarks of Lord Davey in *Barraclough* v. *Brown* (1897, A. C. at p. 624), were addressed. But if its only effect is to provide that the Court may deal with a matter with which it can already deal in a different manner under different circumstances and when brought before it by a different person, it is, in my opinion, only dealing with practice and procedure and is intra vires. The latter, in my opinion, is the position in this case. Admittedly if a declaration as to liability on these bills of exchange were asked for by some one who wanted it for the purpose of giving consequential relief it could be made, and all that the rule does is to remove the restriction imposed upon the making of it by the practice of the court. It is worthy of notice, though not conclusive, that the Act 15 & 16 Vict. c. 86, which by s. 50 gave the right to make a declaration when no consequential relief was given, is called 'An Act to amend the Practice and Course of Proceeding of the High Courts of Chancery.' ''

Buckley, L. J., said at p. 549:

''Further, the declaration authorized by Order XXV, r. 5, is a 'declaration of right'—that is, of the plaintiff's right—'whether any consequential relief is or could be claimed or not.' It does not authorize a declaration of obligation. Where the cause of action is in the defendant and not in the plaintiff the declaration which the plaintiff seeks is a declaration, not of any right which is, but a declaration that his obligation is not that which the defendant alleges.''

Pickford, L. J., at p. 558 stated:

''But I think the contention cannot be maintained either on principle or authority. If there be a cause of action apart from the rule there must be also a consequential right to relief. The

mere fact of being entitled to a right does not give a cause of action, which only arises when there is interference, actual or threatened, with the right, and in that case there is a right to relief, in the first case by damages or injunction or both, or possibly by specific performance, and in the latter by injunction. In such cases, therefore, consequential relief could be given whether it was or was not given, and the rule says a declaration may be made where consequential relief could not be given."

Reliance was placed by both Pickford, L. J., and Bankes, L. J., in arriving at their decisions that the plaintiff did not have to have a cause of action or a right to relief upon the cases of *London Association of Shipowners v. London and India Docks Committee* (1892, 3 Ch. 242); *Dyson v. Attorney-General* (1911, 1 K. B. 410; affd 1912, 1 Ch. 158); and *Burghes v. Attorney-General* (1911, 2 Ch. 139, affd 1912, 1 Ch. 173).

This case of *Guaranty Trust Co. v. Hannay & Co.,* seems to have been followed in the subsequent decisions. Of course one can easily see from the decisions prior to this case in which direction the wind was blowing, and that it was only a matter of time before a decision would come out strongly enough in favor of the negative declaration to stand as a definite and final controlling authority for it in the future.

Necessity of Some Claim Against Plaintiff Who is Seeking Declaration.

After the case of *Guaranty Trust Company v. Hannay & Co.* (*supra*) was decided, a good many received the impression that the gates were thrown wide open and that in the future it would not be necessary that a claim be asserted against the person who sought a declaratory judgment. However, they were disappointed in this and the case of *Clay v. Booth,* decided by the Court of Appeal in 1919 (C. A., 1919, 1 Ch. 66), definitely held that while it had been established by

the case of *Guaranty Trust Company v. Hannay & Co.* (*supra*) that a plaintiff seeking a declaration did not have to have any cause of action, or claim or rights against the defendant, it was still necessary in the alternative that some cause of action, claim or right be possessed by the defendant against the plaintiff and that such cause of action, claim or right be asserted prior to the time when the declaration was sought.

In *Clay v. Booth,* the situation was as follows: A person executed a will leaving a going business to his children and appointed one Booth, the defendant, to run and wind-up the business. The person died. As it was a complicated situation, Booth was very doubtful as to whether he would go ahead with the matter. To induce him to do so, the beneficiaries under the will gave him a deed of indemnity. During the administration of the estate and the winding-up of the business there was a disagreement and Booth losing in the litigation which developed as a result of the disagreement had certain heavy costs assessed against him. The plaintiffs' solicitors wrote to the solicitors for Booth saying it would be useless to prepare a bill of costs against Booth if he could turn around and recover under the deed of indemnity. To this Booth's solicitors replied that whatever rights he had under the deed of indemnity would be asserted at the proper time and that it would be impossible to ascertain then just what relief and rights Booth had under the deed. Then certain of the heirs brought this action for a declaration that Booth had no right to recover under the deed of indemnity.

Great reliance here was placed by the plaintiffs on what Pickford, L. J., said in *Guaranty Trust Co. v. Hannay & Co.,* but Swinfen Eady, M. R., pointed out

that while it was decided that a plaintiff did not have to have a cause of action in order to obtain a declaratory judgment, it was not decided at all that a person could obtain such a judgment where no right or claim was asserted by anyone against him. In other words, even though one may obtain a negative declaration now, there must be some claim or assertion of right against him. This would seem to be theoretically correct, but in applying this to the case then before the Court, they went on very narrow ground in holding that there was no claim or right asserted against the plaintiffs by Booth. Of course, technically no claim had been made under the deed of indemnity, but the whole matter was in dispute and there was not the slightest doubt but that a claim would be made by Booth under the deed.

In his judgment in referring to the case of *London Association of Shipowners v. London & India Dock Joint Committee* (1892, 3 Ch. 242), Eady, M. R., said:

> "That was a case in which regulations had been made which, if valid, would have excluded the right of the Peninsular and Oriental Co. to the unappropriated berths in respect of which the Court determined that they were entitled unfettered by the regulations, and made a declaration to that effect."

A situation analogous to that in *London Association of Shipowners v. London & India Dock Committee* was presented in the case of *Hopkinson v. Mortimer, Harley & Co., Limited,* (1917) 1 Ch. 646. In this case plaintiff owned some fully paid shares in a limited company. The articles of association, as altered by a special resolution, provided that the company should have a first and paramount lien upon all the shares registered in the name of each member for the debts, liabilities, and engagements of such member, and provided fur-

ther that the company might sell the shares in the enforcement of the lien. Plaintiff brought this action for a declaration that his fully paid shares were not subject to the power of forfeiture for debts on the ground that it was ultra vires and illegal. It is to be noted that no threat at all had been made to forfeit his shares, but this special resolution had given the company power to do so. It was held that the plaintiff had not prematurely brought his action for a declaration because his rights had already been invaded and his property damaged; that the lien, being in the nature of a mortgage and the power being given to forfeit the plaintiff's shares upon his failure to redeem on a seven days' notice, was a clog on the equity of redemption and was ultra vires and invalid and plaintiff was entitled to the declaration which he sought.

In both these cases it is quite clear that a right which the plaintiff possessed had not only been threatened but had actually been invaded. In the first case the plaintiff's right to have, if they desired them at some time, unappropriated berths unfettered by the restrictions imposed by the regulations passed had been infringed upon by the passage of the regulations. In the latter case the right of the plaintiff to hold shares unrestricted by such powers of forfeiture as were actually imposed by the special resolution had been invaded and he had been damaged. These cases are easily distinguishable from the situation to which the theory laid down in *Clay v. Booth* applies.

Crown may be defendant in action for declaration.

The cases of *Dyson v. Attorney General* (*supra*) and *Burghes v. Attorney General* (*supra*) which have already been quite fully touched upon, are very defi-

nite authorities for the statement that the Crown may be made a party to an action for a declaratory judgment and indeed in many cases is a necessary party. In both of these cases the plaintiff was attempting to obtain a declaration that there was no obligation to fill in certain forms being issued by public officials, and in both instances the court gave a declaration that there was a freedom from obligation. This would seem to be a very convenient method of determining the power of public officials to do things which are of doubtful validity. As pointed out by the learned justices who rendered the judgments in these cases, questions of this kind are becoming more and more frequent all the time and there should be some convenient mode of determining such questions without waiting for a suit after a failure to comply. The declaratory judgment would seem to be the solution because it would enable persons affected to test the power and authority of public officials without running the risks of incurring severe penalties.

Uses of Declaratory Judgments.

The uses of declaratory judgments are almost without number and actions for declarations as the main or an alternative relief are at the present time occupying the majority of the time of the courts in England which have power to render them. We have already observed during the course of this discussion some good illustrations of incidents where they can be used to advantage. They have been most frequently rendered in connection with the construction and interpretation of written instruments, including the construction and interpretation, as well as testing the validity of, statutes; determination of title and claims to

property; the settlement and determination of jural relations of various kinds, such as legitimacy of children, marriage, lunacy, etc.; and rendering authoritative advice and guidance to those who act in a fiduciary capacity, such as executors, trustees, receivers, etc.

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